Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

SYLVIA DAVIS, as Guardian and Next Friend for Donnell E. Davis; DOSAR-BARKUS BAND OF THE SEMINOLE NATION OF OKLAHOMA; BRUNER BAND OF THE SEMINOLE NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; GALE NORTON, Secretary of the Interior, her agents, employees and successors; DAVID W. ANDERSON, Assistant Secretary of the Interior for Indian Affairs, his agents, employees and successors; GLORIA SPYBUCK, Superintendent, Bureau of Indian Affairs, Wewoka Agency; and JEANETTE HANNA, Regional Director, Bureau of Indian Affairs, Eastern Oklahoma Regional Office, her agents, employees and successors,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tenth Circuit affirmed the holding of the District Court for the Western District of Oklahoma which dismissed the claims of Petitioners. Petitioners, who are members of the Seminole Nation of Oklahoma of African and mixed African-Indian descent ("Estelusti"), brought the action against the United States, Department of the Interior, Bureau of Indian Affairs ("BIA"), and individual U.S. Government officials for systematically excluding them from Federal Funds which are common tribal property. The dismissal was on the grounds that the Seminole Nation ("Tribe") was an "indispensable" party under Fed. R. Civ. P. Rule 19(b), without whom the action could not proceed "in equity and good conscience." In the district court below and on appeal the Estelusti argued that the absent Tribe had no lawful or legitimate interest to assert, and the case could proceed in its absence. The Tenth Circuit's affirmance was made notwithstanding (i) a Treaty with the United States under which the Tribe divested itself of any power to discriminate against its Black members and which makes them equal members of the Tribe; (ii) a federal Statute in which Congress directed that a Judgment Fund voted for the Seminole Nation of Oklahoma be held in trust by the BIA and used "for common tribal needs"; and (iii) findings by the district court that the Government had colluded with the Tribe to deprive Black members of the Tribe of their rightful share in that Judgment Fund in clear violation of Congressional intent.

This case presents an important question of federal law regarding the purpose and proper application of Rule 19 decided by the Tenth Circuit in a fashion which conflicts with relevant authority from this Court, as well as important questions of federal law not decided by this Court, but which should be, regarding the rights of the Estelusti pursuant to Treaty and Statute, the role of Congress vis-à-vis Indian

rights and Indian sovereign immunity, and the power of a Federal Court, sitting in equity, to deal with acts of Government agents which discriminate against minority citizens because of their race.

Here, where the district court made findings that the BIA, together with Tribal leaders, colluded to divert federal funds that were Congressionally voted for the use of the Seminole Nation of Oklahoma for "common Tribal needs," in such a way that the funds were systematically kept from Black members of the Tribe, two questions are presented:

1. In making a Rule 19 determination of the "indispensability" of an absent party, may a court avoid deciding whether the absent party's claimed interest is "frivolous" or "legally protected" by asserting that such would be a determination of the merits of the dispute?

2. Under Rule 19, where the purported interest of the absent tribe – to discriminate against its Black members – has been divested (i) by Treaty which granted equal rights of such Black citizens to common tribal property, and (ii) by Federal Statute which awarded funds to the Seminole Nation of Oklahoma for "common tribal need," and directed the BIA in approving plans for the use of Funds to be sure to protect the rights of minority members of the tribes who are granted such federal funds, is that "interest" a legally protected one?

LIST OF PARTIES

The parties below are listed in the caption, with the following exception: as successor to the position of Assistant Secretary of the Interior for Indian Affairs, David W. Anderson has been substituted for former defendant Neil McCaleb.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Davis v. United States*, 343 F.3d 1282 (10th Cir. 2003) ("*Davis II*"). The Tenth Circuit affirmed the April 25, 2002 decision of the United States District Court for the Western District of Oklahoma, reported at *Davis v. United States*, 199 F. Supp. 2d 1164 (W.D. Okla. 2002). The District Court's decision in *Davis II* was rendered after remand by the Tenth Circuit in an opinion reported at *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999) ("*Davis I*"). The District Court's initial decision, *Davis v. United States*, decided March 20, 1998, is not officially reported. *See* Appendices A - D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Tenth Circuit's opinion was rendered on September 10, 2003. The Petition for Panel Rehearing or Rehearing En Banc was denied on December 16, 2003. *See* Appendix E.

TREATY AND STATUTES INVOLVED

The relevant portions of the Treaty with the Seminole Indians, Mar. 21, 1866, U.S.-Seminole Nation of Indians, Art. II, 14 Stat. 755, 756 are set out in Appendix F. The relevant provisions of the Distribution of Funds to Seminole Indians, Public Law No. 101-277, Sections 2(a)(1), 4(a), 4(b), 8(a), 104 Stat. 143 (1990); 25 U.S.C. §122 ("Limitations on application of tribal funds"); and, Distribution of Judgment Funds Act, 25 U.S.C. §§1401-1408 are lengthy and therefore are set out in Appendix G.

STATEMENT OF THE CASE

Petitioners, plaintiffs/appellants below, are minority citizens (hereinafter referred to as the "Estelusti" or "Black Seminoles") of the Seminole Nation of Oklahoma (the "Seminole Nation" or "Tribe"). Petitioners brought this action in 1996 to remedy misconduct by the United States Department of the Interior, Bureau of Indian Affairs, and certain federal officials (the Government defendants are herein collectively referred to as "the BIA"), in the management of a Judgment Fund trust granted by Congress to the Seminole Nation. The BIA and certain Tribal leaders have prevented the Estelusti from participating in Judgment Fund programs because of their race. Petitioners sought a declaration that they are entitled to share in Judgment Fund programs and an injunction forbidding the BIA to disburse Judgment Funds in derogation of that right.

The District Court found that the Seminole Nation is an Indian tribe comprised of people of both Native American and African descent, formed after the European colonization of America. The Black Seminoles descend from escaped slaves who entered Florida in the 18th and 19th centuries and assimilated with the many distinct groups of Native Americans who had migrated to the region during the same period. Although some were nominally slaves of the Native Americans, many lived as free people, tilled their own fields, carried guns and were home owners. In time these Native Americans and people of African descent became known together as "Seminoles." In a war against the United States waged by the Seminoles, the Black Seminoles served as, *inter alia*, warriors, interpreters, negotiators and spies.

Following the end of the Seminole War (the army in its dispatches often referred to it as "the Negro War"), during 1838-42, many Seminoles, including the Estelusti, were

forcibly removed from their home in Florida to what is present-day Oklahoma along the "Trail of Tears."

In 1866, the Seminole Nation entered into a treaty with the United States ("1866 Treaty"). That treaty (App. F) provides:

> Inasmuch as there are among the Seminoles many persons of African descent and blood . . . these persons and their descendants . . . shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color . . . .

In 1950, the Tribe brought suit before the United States Indian Claims Commission to remedy the injustice of its forcible removal from Florida, and in 1976, judgment was rendered in favor of the Tribe. Thereafter, Congress appropriated a fund, a portion of which went to the Seminoles still living in Florida, and a portion of which was granted "to the Seminole Nation of Oklahoma." Pub. L. No. 101-277, §§ 2(a)(1), 4(a), 4(b), 8(a), 104 Stat. 143 (1990) (the "Distribution Act"). This fund (the "Judgment Fund") is held in trust by the BIA. By its terms, the Distribution Act required the Tribe to submit a usage plan ("Usage Plan") for these funds and that at least 80% of the Fund should be used for "common Tribal needs . . ."; interest on the balance could be distributed "per capita." (App. G at 92a.)

The Judgment Fund Act (App. G at 94a-96a) prescribes guidelines with respect to such funds held in trust by the BIA. It provides:

> The Secretary [of the Interior] shall prepare a plan which shall best serve the interests of all

> those entities and individuals entitled to receive funds of each Indian judgment.
>
> * * *
>
> (b) Guidelines
> In preparing a plan for the use or distribution of the funds of each Indian judgment, the Secretary shall, among other things, be assured that –
>
> * * *
>
> (2) The needs and desires of any groups or individuals who are in a minority position, but who are also entitled to receive such funds, have been fully ascertained and considered[.]

(App. G at 95a, 96a)

In 1990 and 1991, the Tribe and the BIA prepared a Usage Plan. Instead of a plan prepared by the Secretary, as contemplated by the Judgment Fund Act, the Usage Plan provided only that the Tribe would propose programs for BIA approval. (App. C at 60a-61a.) Beginning in 1991, the BIA began to approve programs, utilizing eligibility criteria prepared by the Tribe. The eligibility criteria excluded the Estelusti from all such programs.

The Estelusti brought the instant suit in January 1996, seeking, *inter alia*, a declaration that Congress did not authorize the exclusion of the Estelusti from Judgment Fund programs and an injunction barring further disbursements of Judgment Fund monies by the BIA for expenditures in a racially discriminatory fashion, contrary to the 1866 Treaty and the intent of Congress as expressed in the Distribution Act and the Judgment Fund Act. Federal jurisdiction was predicated on 28 U.S.C. §§ 1331 and 1362, in that it was a

civil action arising under the Constitution, laws, and a Treaty of the United States and was brought by officially recognized Indian bands. Jurisdiction to review agency action was pled under 5 U.S.C. §§ 702-703. Jurisdiction for declaratory relief was invoked pursuant to 28 U.S.C. §§ 2201-2202.

On March 20, 1998, the District Court dismissed the Estelusti's complaint under Fed. R. Civ. P. 19(b) for failure to join a supposedly indispensable party, the Tribe, which could not be joined because of sovereign immunity. (App. D at 88a.)

The Tenth Circuit reversed and remanded. (App. C at 75a.) It upheld the District Court's decision that the Tribe was a "necessary" party because, it explained, "Rule 19 . . . does not require the absent party to *possess* an interest; it only requires the movant to show that the absent party *claims an interest* relating to the subject of the action." (App. C at 67a) (internal quotation omitted; emphasis in original). The appellate court also stated that if an excluded party had only a "frivolous" claim of interest, it would not be a necessary party, nor could it be an indispensable one. (App. C at 67a.) The court rejected as premature, however, Petitioners' argument that, based on the 1866 Treaty and Congress's intent that the Estelusti share in the Judgment Fund, the supposed "interest" of the absent Tribe could not be a legally protected interest for purposes of Rule 19(a), stating that the Estelusti's argument assumed the facts to be determined by the lawsuit and "presupposes Plaintiffs' success on the merits." (App. C at 67a.)

The Tenth Circuit could not, however, review the holding that the Tribe was also an "indispensable" party, because the District Court had not performed a Rule 19(b) analysis. The case was therefore remanded with instructions to the District Court to make factual findings pursuant to Rule 19(b) and "to determine whether, in equity and good

conscience, Plaintiffs' Judgment Fund Award claim can proceed in the absence of the Tribe." (App. C at 75a.)

As instructed, the District Court made findings of fact before rendering its Rule 19(b) decision. The Court found that:

> • Since at least 1976, "the BIA intended to exclude the Black Seminoles from the benefits of the Judgment Fund Award." (App. B at 31a.)
>
> • "Despite the directive [of the Distribution Act] to utilize the [Judgment] funds for common tribal needs . . . the BIA and the Seminole Nation sought to exclude the Black Seminoles as beneficiaries of these programs." (*Id.* at 33a.)
>
> • The BIA knew that any Usage Plan that excluded the Estelusti "would not receive the required Congressional vote," (App. B at 32a), and that "[the BIA's] exclusionary proposal would not be approved by Congress . . . ." (*Id.* at 32a.) Therefore, "the BIA assisted the Seminole Nation in formulating a plan that could prevent the Black Seminoles' participation in the Judgment Fund Award and still receive Congressional approval." (*Id.* at 32a.)
>
> • To accomplish this goal, the BIA considered several options, including the possibility that a plan excluding the Estelusti might "slip[] through if Congress was busy with the Middle East crises on their minds." (*Id.* at 35a.)

• The Usage Plan created by the BIA and the Tribe innocuously required the Tribe to submit programs to the BIA for approval. (*Id.* at 35a-36a.) Thus, review of Judgment Fund programs would occur at the Agency level only.

• Congress approved the Usage Plan on or about March 30, 1991. Because the BIA kept its discriminatory intent secret (*Id.* at 32a), Congress was unaware of the scheme to exclude the Estelusti from Judgment Fund benefits. (*Id.* at 33a.)

• After the Usage Plan became effective, the Tribal Council submitted several Judgment Fund programs for BIA approval, which the BIA then approved. (*Id.* at 37a.) Each program so established contains the Eligibility Requirement that the beneficiary be "descended from a member of the Seminole Nation as it existed in Florida on September 18, 1823." (*Id.* at 36a.)

• Because the Black Seminoles were not expressly recognized as members of the Seminole Nation until the 1866 Treaty, the effect of the Eligibility Requirement is to exclude the Black Seminoles from participating in any Judgment Fund Program

that conditions participation on meeting the Eligibility Requirement.[1] (*Id.* at 36a.)

The District Court decided that the Tribe and the BIA would be prejudiced by adjudication in the Tribe's absence, and that such prejudice could not be lessened. (*Id.* at 47a.) It decided that a judgment against the BIA in the Tribe's absence would be ineffective. The District Court also determined that the Estelusti had no remedy other than this lawsuit, because pursuing Tribal remedies was futile in light of the discrimination that the Estelusti face in the Seminole government. (*Id.* at 49a.) Thus, despite the facts set forth above and "the Court's belief that plaintiffs should not be prevented from having their case tried on the merits," the District Court concluded that the Tribe was indispensable and dismissed the Estelusti's Judgment Fund claims. (*Id.* at 54a-55a.)

On appeal Petitioners again argued that the Tribe's interest was not a legally protected one, and thus the Tribe's absence should not prevent the case from going forward. The Tenth Circuit declined to address that issue and affirmed dismissal of the Complaint, holding that "the underlying merits" of the dispute "are irrelevant to a Rule 19 inquiry[.]" (App. A at 13a.)

In separate proceedings (not before this Court on the instant Petition), the Tribe sued the BIA in the District of Columbia seeking an order compelling the BIA to pay out portions of the Judgment Fund and to put the Fund under the control of the Tribe. When the Estelusti sought to intervene,

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[1] The conclusion that the Estelusti were not members of the Tribe until 1866 is erroneous, but it accurately reflects the position of the BIA.

the BIA opposed the motion. The District Court refused to permit intervention. *See Seminole Nation v. Norton*, 206 F.R.D. 1 (D.D.C. 2001).

The Estelusti have thus been foreclosed from relief in any forum. In the Oklahoma action (the subject of the instant petition) the courts have dismissed based on the BIA's argument that the Tribe is absent. In Washington, D.C., where the Tribe was present, the BIA argued successfully against the Estelusti's intervention.

REASONS FOR ALLOWANCE OF THE WRIT

Although the notion of outright racial discrimination by the federal government seems today an anachronism, this case was brought to vindicate the rights of a long-oppressed and disadvantaged people, the Estelusti, whose only hope of a remedy from racial discrimination practiced against them is in this lawsuit. The Tribe has hidden its unlawful, discriminatory conduct behind its sovereign immunity, and the BIA has avoided judicial review of its unlawful, discriminatory conduct by asserting that the Tribe is an "indispensable" party.

The proper interpretation and application of Rule 19(b) is an important question, so that the equity powers of the federal courts are not limited by an inflexible reading of the Rule. Shortly after Rule 19 was amended, this Court cautioned against rigid application and instead counseled a "flexible" approach with "pragmatic considerations" being paramount. This Court has directed the lower courts to examine the facts of each case to make certain that the "interests" of absent parties "really exist." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). The Tenth Circuit has asserted that it will not examine a purported "interest" of an absent party because to do so would be to reach the merits of the action, and has

declared the merits of the underlying case to be irrelevant to a Rule 19 analysis. Review is needed to prevent misapplication of Rule 19 in the Tenth Circuit and in lower courts elsewhere.

Further, this case presents a question that has not, but should be, decided here: the rights of minority persons within Indian tribes in light of Treaty and legislation. The absent Tribe has, by Treaty, divested itself of the power to discriminate against its minority members on account of their race. The Estelusti are members of the Tribe and entitled to share equally in Tribal property, and the statutory framework providing for the holding in trust and distribution of the Judgment Fund shows that Congress intended the Fund to be used for common Tribal needs. The BIA and the Tribe colluded to create a plan by which the BIA would delegate to the Tribe the power to discriminate, and thus avoid the inevitable defeat by Congress that both knew would occur. Review is necessary to establish the boundaries of Indian sovereign immunity and self-government when Treaty and federal legislation prohibit the conduct at issue.

I. REVIEW IS WARRANTED AS THE DECISION OF THE COURT OF APPEALS ON AN IMPORTANT FEDERAL QUESTION – PROPER APPLICATION OF RULE 19 – CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Below, Petitioners argued that the interest of the absent Tribe was not a legally protected one: to discriminate against its Black members by excluding them from common tribal property, the Judgment Fund. The Court of Appeals summarily rejected the argument, asserting that it had already ruled in considering the absent Tribe's interest under Rule 19(a) that the Estelusti's approach "is untenable because it would render the Rule 19 analysis an adjudication on the

merits," and that the underlying merits are irrelevant to a Rule 19 determination. (App. A at 12a.) This holding is in conflict with the prior holding of this Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968) ("*Provident Bank*").

In *Provident Bank*, decided shortly after the Rule was amended to its current form, this Court made clear that Rule 19 "*commands* the courts to examine each controversy to make certain that the interests really exist." 390 U.S. at 119 (emphasis added). That "command" is what has been lost in the rigid application of Rule 19 by the Tenth Circuit. *See Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001), *citing Davis I*. Nothing in Rule 19 or in Supreme Court authority directs, or even permits, the federal courts to turn a blind eye to what is really at stake for the absent party. The Tenth Circuit's "rule" regarding the "merits" is without any support.[2] Rule 41(b) provides that a Rule 19 ruling is not an adjudication on the merits.

In *Provident Bank* this Court directed the federal courts to be "flexible" and "pragmatic" in applying Rule 19, pointing out that it derives from a rule of equity. The Court quoted former Chief Justice John Marshall's reminder that the rule that courts of equity require that all concerned parties be brought before the court so that the matter in controversy may be finally settled is

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[2] In the decision at issue here, the Tenth Circuit cites, as support for its rule, *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001). (App. A at 13a.) That case, in turn, cites *Davis I*, which merely held that a determination on the merits in that case – where no fact findings had yet been made – was premature, and went on to recite that the absent party's interest may not be a "patently frivolous" one. (App. C at 67a.)

> "an equitable rule, however, [that] is framed by the Court itself, and is subject to its discretion . . . . Being introduced by the Court itself, for the purposes of justice, [the rule] is susceptible of modification for the promotion of those purposes . . . . In the exercise of its discretion, the Court will require the plaintiff to do all in his power to bring every person concerned in interest before the Court. But, if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the Court cannot reach . . . ought not to prevent a decree upon its merits."

Id. at 120-21 (quoting *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166-168 (1825)).

The Court in *Provident Bank* evaluated at length the interest of the absent party in that case. *See* 390 U.S. at 113-116. The opinion states that the nonjoined party must have an interest that "really exist[s]," 390 U.S. at 119, and that substantive law may determine what interest the absent person "actually has." *Id.* at 125 n.22. Here, in contrast, the Tenth Circuit failed even to identify the supposed interest of the Tribe, let alone to consider whether that interest "really exists."

The *Provident Bank* Court rejected the lower court's holding that the right of a person "who may be affected" by the judgment in an action has a substantive right to be joined. *Id.* at 107, 118 n.13. *Provident Bank* did not suggest that adjudication of a matter in the absence of a party who could not be joined could not take place "in equity and good conscience," even if that party did have an interest to protect. Indeed, the Court described an adjudication that would bind

all parties as "[t]he optimum solution," 390 U.S. at 108, but not the only solution. The Court recognized that because the absent party could not be bound by the judgment, he might eventually have to relitigate the issue presented by his own interest, *id.* at 114, but it refused to permit considerations of "efficiency" to defeat the equitable, flexible purpose of Rule 19. *Id.* at 116.

This Court's decision in *Provident Bank* is that the question is not whether the absent party has an interest that is "adverse" to that of a present party, but whether in proceeding in his absence that party would be "harmed" by a judgment. *Id.* at 114. If the absent party would not be bound by the judgment, his interest could not be "harmed." *Id.* Regarding the absent party in *Provident Bank*, this Court observed that "the only possible threat" to his interest in an insurance fund was that the fund might be dissipated before he had an opportunity to assert his interest. *Id.* at 114-15. The court found this "threat" "neither large nor unavoidable." *Id.* at 115. Here, it cannot be said that the interest, if there be one, of the absent Tribe in the Judgment Fund is any larger. Petitioners show below in Point II that the supposed interest of the absent Tribe is not a legally protected one, as it is contrary to the Tribe's obligations pursuant to treaty, and to the intent of the Judgment Fund legislation.

The Tenth Circuit failed to take account of the District Court's findings that the BIA and Tribe and colluded to evade Congressional intent and to deprive the Estelusti of benefits voted for them by Congress. Instead, the Tenth Circuit blindly adhered to its rigid rule of holding that the merits of the dispute are "irrelevant." Where, as here, the District Court had further found, and the Tenth Circuit did not disagree, that the Estelusti had no other recourse than the instant suit, it is plain that justice has been defeated. This is in conflict with the holding of this Court in *Provident Bank*,

390 U.S. at 117 n.12, that Rule 19(b) may not be used to defeat justice.

In holding that Rule 19(b) may not be used to defeat justice, *Provident Bank*, 390 U.S. at 116 n.12, the Court's statement implies that the merits may be considered in a case, such as that presented here, where the merits of the absent party's supposed interest overlap with the merits of the dispute.

Where no determination relating to the merits could be made without a trial, a court may still weigh the interest of the absent party. *See, e.g., Idaho ex rel. Evans v. Oregon*, 444 U.S. 380 (1980). In that case, while this Court could not determine the merits of an argument made by Idaho without a trial, the Court considered the possible alternative outcomes and determined that neither outcome, given the asserted interest of the absent party, made it impossible to go forward with the case without the absent party.

In other cases, such as here, the question of the merit of the absent party's interest is not legally protected as a matter of law. No trial is necessary, and the issue may be determined preliminarily and as a legal matter under Rule 19. No such ruling constitutes an "adjudication of the merits." The absent party is not bound. *See Provident Bank*, 390 at 110; Rule 41. The defendant party, which is present, may either appeal, or if it claims material facts are in dispute, demand a trial.

If, as is universally held, a frivolous interest, or one that is not legally protected, cannot justify a Rule 19 dismissal,[3] then it follows that in order to determine whether

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[3] *American Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015, 1025 (9th Cir. 2002) ("legally protectible interest"); *United*

(*continued on next page*)

to proceed in equity and good conscience without the absent party, a court must determine whether a claimed interest is frivolous or one not legally protected.

Application of Rule 19 as rigidly applied by the Tenth Circuit on the facts here defeated justice and gave judicial imprimatur to conduct that no court of equity would condone: racial discrimination by federal agents against minority citizens. This is conduct long held to be "odious." *See, e.g., Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *see also Brown v. Board of Education*, 349 U.S. 294 (1955).

(*continued from previous page*)
States v. San Juan Bay Marina, 239 F.3d 400, 406 (1st Cir. 2001) ("a party is necessary under Rule 19(a) only if they [sic] claim a 'legally protected interest' relating to the subject matter of the action"); *Rama Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996) (Rule 19 analysis must always begin with assessment of whether nonparty Tribes have a legally protected interest); *Yellowstone County v. Pease*, 96 F.3d 1169, 1171 (9th Cir. 1996) ("legally protected interest"); *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41 (2d Cir. 1996) (affirming lower court's ruling that joinder of absent party not required) (*citing Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983)) (absent party must claim a "legally protected interest"). *See also Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 959 (10th Cir. 2001) (Rule 19 excludes claimed interests that are "patently frivolous.") (*citing Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999)); *Keweenaw Bay Indian Cmty. v. Michigan*, 11 F.3d 1341, 1347 (6th Cir. 1993) (court not required to find a party necessary based on "patently frivolous claims"); *Wyandotte Nation v. City of Kansas City*, 200 F. Supp. 2d 1279, 1291 (D. Kan. 2002) (same); *Sierra Club v. Young Life Campaign, Inc.*, 176 F. Supp. 2d 1070, 1078 n.3 (D. Colo. 2001) (same).

II. REVIEW SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW NOT DECIDED BY THIS COURT, BUT WHICH SHOULD BE DECIDED, REGARDING THE RIGHTS OF MINORITY CITIZENS OF INDIAN TRIBES AND THE LIMITS OF TRIBAL SOVEREIGNTY AND SELF GOVERNMENT IN LIGHT OF TREATY AND STATUTORY LAW.

A. By Treaty The Tribe Has Divested Itself Of Power To Discriminate Against Its Minority Members On The Basis of Race.

There is no dispute in this case that Petitioners are members of the Seminole Nation of Oklahoma. By virtue of the 1866 Treaty, they are entitled to the rights of all citizens of the Tribe. Prior challenges mounted by the Tribe to the rights of the Estelusti to share in common Tribal property have been rejected by the courts.

In 1933, the United States Court of Claims held that the rights granted by the Tribe in the 1866 Treaty to the Estelusti were "all the rights" of a native member or citizen of the Seminole Tribe or Nation, including "rights in the soil and civil rights." *Seminole Nation v. United States*, 78 Ct. Cl. 455, 1933 WL 1802, at *8 (1933) ("*Seminole I*"). That decision was reaffirmed by the Court of Claims in 1940, in *Seminole Nation v. United States*, 90 Ct. Cl. 151 (1940) ("*Seminole II*"). In *Seminole II*, the Tribe sought a declaration that under the 1866 Treaty the Estelusti were entitled to political rights but not Tribal property rights. The court rejected that argument based on the express language of Article II of the 1866 Treaty. *Id.*, 90 Ct. Cl. 151.

Accordingly, it is *res judicata* against the Tribe that the Estelusti are entitled to share in common Tribal property.

B. Pursuant To Federal Law Common Tribal Property Belongs To All Current Members Of The Tribe.

Under well-settled law, Indian Claims Commission judgment fund awards belong to the tribal entity and not to individual Indians or their descendants, unless Congress specifies otherwise.[4] *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977) (Indian Claims Commission judgment fund awards are "tribal rather than individually owned property"). Common tribal property, in turn, belongs to all current members of the Tribe, and not to a subset of members descended from specific ancestors. Felix S. Cohen, *Handbook of Federal Indian Law* (1982) at 472 ("Tribal property is a form of ownership in common. * * * [It is] held in common for the benefit of all living members of the tribe, a class whose composition continually changes as a result of births, deaths and other factors."); *Cherokee Nation v. Journeycake*, 155 U.S. 196, 208-11 (1894) (newly-added members of a tribe are "equally with the native Cherokees . . . entitled to share in the profits and proceeds" from the sale

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[4] Pursuant to the Indian Claims Commission Act, Pub.L. No. 79-726, 60 Stat. 1049, under which the Judgment Fund was sought and awarded in the first instance, Congress has the exclusive authority to determine who among a Tribe's members may participate in a judgment fund award. *See, e.g., Cherokee Freedmen v. United States*, 195 Ct. Cl. 39, 1971 WL 17825 at *4 (1971) ("Congress . . . has taken upon itself . . . this function of defining the individuals or classes who are to share in a judgment under the Act.") *See also Delaware Tribal Bus. Comm,* 430 U.S. at 83 (upholding Indian Claims Commission Act; "the power over distribution of tribal property has 'been committed by the Constitution to Congress.'" (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

of land owned exclusively by the original members of the tribe).

The Estelusti are undeniably members of the Seminole Nation. *See Seminole Nation of Oklahoma v. Norton*, 223 F.Supp.2d 122 (D.D.C. 2002). Article II of the 1866 Treaty guarantees that the Estelusti shall "have and enjoy the rights of native citizens." (App. F.) It guarantees equal treatment which includes "equal rights in tribal property . . . ." *Seminole Nation v. United States*, 90 Ct. Cl. at 153. The Treaty remains in full force and is the supreme law of the land.[5] ("the Treaty of 1866 has not been abrogated by subsequent agreement or statute . . ."). (App. H at 129a.) There is no dispute in this record that the Estelusti are members of the Tribe. Thus, the Estelusti are entitled as a matter of law to share equally in the common Tribal Judgment Fund. It follows that, for purposes of Rule 19(b) analysis, the Tribe has no legally protected interest in excluding the Estelusti from the Judgment Fund.

The District Court suggested that the Tribe had an interest in how to govern its own programs, and how its money should be spent for benefits. (App. B at 47a-48b.) Such an interest, however, goes no further than choices as to how to spend the Fund - *e.g.*, guns versus butter, housing versus schools, or clothing versus medical care. Because of

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[5] The 1866 Treaty further mandates that the Estelusti share in the Judgment Fund because 25 U.S.C. § 122 provides that: "No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law." (App. G at 93a.) Whatever, if any, "interest" a tribe may have in its sovereign self-governance, that tribal sovereignty is dependent on and subordinate to the federal government. *Washington v. Confederated Tribes of Colville Ind. Reserv.*, 447 U.S. 134, 154 (1980).

the 1866 Treaty and the Distribution Act and the Judgment Act, however, the Tribe has no lawful interest in excluding its Black citizens from all Fund programs.[6] A decree in this case that the BIA may approve no application for Judgment Funds made by the Tribe which discriminate against the Estelusti would not interfere with the Tribe's interest in making legitimate spending or self-governmental choices. Accordingly, the action can go forward in the absence of the Tribe without in any way harming any actual interest of the Tribe.

C. The Statutory Framework Establishes That Congress Intended The Fund To Go To All Members Of The Tribe.

The Judgment Act directed the BIA to hold the funds "in trust" and required the BIA to prepare a plan "which shall best serve the interests of all those entities and individuals entitled to receive funds." (App. G at 95a.) The Act further directed the BIA to be sure that "the needs and desires of any groups or individuals who are in a minority position, but who are also entitled to receive such funds, have been fully ascertained and considered," (App. G at 96a.)

The Distribution Act directed the BIA to hold the Fund in trust and to use at least 80 percent of it for "common tribal needs"; interest on the balance could be distributed "per capita." (App. G at 92a.)

There is no room in this statutory scheme for a reading of these statutes which permits systematic exclusion

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[6] A tribe has the power to determine tribal membership unless limited by treaty or statute, *see U.S. v. Wheeler*, 435 U.S. 313, 322 n.18 (1978). There is no dispute on this record that petitioners are members of the Tribe because of the 1866 Treaty.

of a minority group, the Estelusti, from enjoyment of their rightful share of common Tribal property, held in trust for all members of the Tribe by the BIA.

D. The District Court's Findings Demonstrate That The Absent Tribe Has No Legally Protected Interest.

It is plain from the District Court's findings that the BIA and the Tribe knew they were breaking the law. The District Court found that "the BIA intended to exclude the Black Seminoles from the benefits of the Judgment Fund Award" (App. B at 31), and that "[d]espite the directive [of the Distribution Act] to utilize the [Judgment] funds for common tribal needs . . . the BIA and the Seminole Nation sought to exclude the Black Seminoles as beneficiaries of these programs." (App. B at 33.) The District Court further found *that the BIA knew that excluded the Estelusti "would not receive the required Congressional vote*," and the *"exclusionary proposal would not be approved by Congress . . . ."* (App. B at 32 (emphasis added).) The District Court found that it was because it knew that an exclusionary Usage Plan would never receive the approval of Congress that "the BIA *assisted the Seminole Nation in formulating a plan that could prevent the Black Seminoles' participation in the Judgment Fund Award and still receive Congressional approval."* (App. B at 32.)

These findings that the Tribe itself, as well as the BIA, well knew Congress intended the Estelusti to share in the Fund. The BIA should not have been heard, in a court of equity, to claim that the absent Tribe had a legally protected interest.

Accordingly, when the facts are examined – as this Court in *Provident Bank* expressly stated they must be – it is plain that there is no right or interest which could be claimed

by the absent Tribe to systematically exclude minority members of the Tribe from sharing in the common Tribal property at issue here, the Judgment Fund. As a result, the Petitioners' claim against the BIA should have been allowed to proceed in the absence of the Tribe.

CONCLUSION

For all the foregoing reasons Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND DECIDED SEPTEMBER 10, 2003 ("Davis II").

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

SYLVIA DAVIS, as Guardian and Next Friend for Donnell E. Davis; DOSAR-BARKUS BAND OF THE SEMINOLE NATIONAL OF OKLAHOMA; BRUNER BAND OF THE SEMINOLE NATION OF OKLAHOMA,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; GALE NORTON, Secretary of the Interior, her agents, employees and successors; NEAL A. MCCALEB, Assistant Secretary of the Interior for Indian Affairs, his agents, employees and successors; GLORIA SPYBUCK, Superintendent, Bureau of Indian Affairs, Wewoka Agency; and JEANETTE HANNA, Regional Director, Bureau of Indian Affairs, Eastern Oklahoma Regional Officer, her agents, employees and successors,

Defendants-Appellees.

No. 02-6198

Sept. 10, 2003

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. NO. CIV-96-1988-M)

Before **MURPHY, BALDOCK**, and **HARTZ**, Circuit Judges.

HARTZ, Circuit Judge.

Plaintiffs are two bands of the Seminole Nation of Oklahoma (the Tribe) – the Dosar Barkus and Bruner Bands- and Sylvia Davis as the guardian and next friend of Donnell E. Davis, a member of the Dosar Barkus Band. They claim that because of their African ancestry, they have been systematically denied benefits routinely provided to other members of the Tribe. Plaintiffs did not sue the Tribe itself but instead brought suit against the United States and various federal agencies and officials. Plaintiffs contend that (1) the federal officials wrongfully allowed the Tribe to exclude them from participation in some of its assistance programs, and (2) the Bureau of Indian Affairs (BIA) improperly refused to issue Certificates of Degree of Indian Blood (CDIBs) to members of the Plaintiff-bands. They seek declaratory and injunctive relief.

The district court initially dismissed the case for failure to join an indispensable party, the Tribe. *Davis v. United States*, No. CIV-96-1988-M, slip op. at 10 (W.D. Okla. Mar. 20, 1998). On appeal we affirmed in part, reversed in part, and remanded to the district court for further consideration. *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999) (*Davis I*). On remand the district court again dismissed Plaintiffs' claims. *Davis v. United States*, 199 F. Supp. 2d 1164 (W.D. Okla. 2002) (*Davis II*). We now hold that (1) the district court did not abuse its discretion in determining that the Tribe is an indispensable party with respect to the wrongful-exclusion claim, and (2) the district court correctly ruled that it lacked jurisdiction to hear the CD

IB claim because Plaintiffs failed to show that they had exhausted their administrative remedies. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

Our discussion of the historical background can be brief because of the thorough treatment in Davis I and Davis II. The Seminole Nation was formed after the European conquest of America. In addition to members of Native American ancestry, it also includes members of African ancestry, descendants of escaped slaves who began living among Native American groups in the then-foreign territory that became Florida. In 1823 the Seminole Nation's Florida lands were ceded to the United States by the Treaty of Camp Moultrie. Thereafter, most of the Seminole Nation's people, including those of African ancestry, were forcibly removed to what is now Oklahoma.

After removal the Tribe entered into a treaty with the United States addressing the rights of its members of African descent, the "Estelusti." That treaty, which we will refer to as the Treaty of 1866, contains the following language:

> [I]nasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color who may be adopted as citizens or members of said tribe.

Treaty with the Seminole Indians, Mar. 21, 1866, U.S.-Seminole Nation of Indians, Art. II, 14 Stat. 755, 756. Notwithstanding this sweeping language, the United States itself continued to distinguish the Estelusti from tribal members of Native American ancestry.

For instance, when the Dawes Commission in 1906 created official membership rolls for the Seminole Nation of Oklahoma, it created two rolls, one for those of Native American ancestry (the "Seminole Blood Roll") and one for the Estelusti (the "Freedmen Roll"). A member of mixed ancestry was classified in accordance with maternal ancestry. Today, these membership rolls, often referred to as the "Dawes Rolls," are authoritative evidence of tribal membership. Any person who can show descent from a person listed on either of the two rolls is recognized as a member of the Tribe.

The Tribe's members are divided among 14 bands. The two Plaintiff-bands consist entirely of descendants of those listed on the Freedmen Roll. Even as tribal members, however, the Estelusti do not receive full membership benefits. Participation in some of the Tribe's programs requires a CDIB card, "the BIA's certification that an individual possesses a specific quantum of Indian blood." *Davis I*, 192 F.3d at 956.

A member of the Tribe can obtain a CDIB card by proving a specified relationship to a person listed on the Seminole Blood Roll. A person who proves the same relationship with respect to a person listed on the Seminole Freedmen Roll, however, is not entitled to a CDIB. In a letter dated October 4, 1995, the Superintendent of the Wewoka Agency of the Bureau of Indian Affairs explained this differential treatment:

> The Certificate of Degree of Indian Blood makes or infers no mention of Tribal Membership. The policy states that my responsibility is to certify one[']s Indian blood when acceptable proof of relationship to an individual enrolled on specific rolls of particular tribes [is presented]. . . . [T]here are persons listed on the Freedman roll who were part Indian. As you know, the Seminole Nation follows maternal lineage, for example, if the person's mother was [F]reedman and the father was Indian by blood, the person was enrolled in the [F]reedman roll. This person was still part Indian and he/she and his/her descendants would be eligible to receive a [CDIB]. . . . Our policy is not to deny [Freedmen CDIBs], but to state that adequate proof of relationship to a person with Indian blood has been provided by them.... Stated simply, if a Freedman band member or anyone else applies for a [CDIB] that cannot provide acceptable proof of relationship to a Seminole Indian by blood, they will be denied a [CDIB].

Aple. Supp. App. at 168-69. According to Plaintiffs, many members of the Dosar Barkus and Bruner Bands of the Seminole Nation of Oklahoma have been denied CDIBs under the BIA's policy. Consequently, members of the Plaintiff-bands have been excluded from participation in programs for which CDIB cards are required.

Among the programs to which members of the Plaintiff-bands have been denied access are what the parties refer to as judgment-fund programs. These programs are supported by a $56 million judgment awarded to "the

Seminole Nation *as it existed in Florida on September 18, 1823*," *Davis I*, 192 F.3d at 955-56 (internal quotation marks omitted; emphasis added), as compensation for the 1823 taking of its Florida lands. Before Congress released the judgment funds for the use of the Tribe, the BIA recommended that it exclude the Estelusti from participation because the Estelusti were not officially recognized as members of the Tribe until the Treaty of 1866.

Congress did not, however, specifically exclude the Estelusti; it simply allocated the Tribe's share of the judgment to the "Seminole Nation of Oklahoma." Act of April 30, 1990, Pub. L. No. 101-277, § 2(a)(1), 104 Stat. 143, 143 ("Distribution Act"). (The remainder of the funds were awarded to "the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida and the independent Seminole Indians of Florida." Distribution Act, § 2(a)(2), 104 Stat. at 143.) Instead of creating its own detailed distribution plan for use of the funds, Congress allowed the Tribe, in conjunction with the Secretary of the Interior, to propose its own plan so long as that plan "provide[d] that not less than 80 per centum [of the Tribe's judgment fund] ... be set aside and programmed to serve common tribal needs, educational requirements and such other purposes as the circumstances of the Seminole Nation of Oklahoma may determine." Distribution Act, § 3(a) & § 4(a), 104 Stat. at 143-44.

Thereafter, the Tribe's General Council adopted a proposed distribution plan. The plan submitted to Congress generally provided that the Tribe's judgment funds would be used to support programs in such areas as "[h]ealth, education, [and] social services"; but it did not describe any programs specifically. Plan for the Use of the Seminole Nation of Oklahoma Indian Judgment Funds in Docket Nos. 73 and 151 Before the Indian Claims Commission, 56 Fed. Reg. 32,480, 32,480 (July 16, 1991). Instead, it provided that

the Tribe would develop specific programs and submit proposals for those programs to the BIA for approval. When Congress did not reject the Tribe's plan, it became effective under § 4(d) of the Distribution Act. See 104 Stat. at 144 ("A plan for the... distribution of the judgment funds referred to in this Act shall be implemented . . . immediately at the end of the sixty-day period . . . beginning on the day such plan is submitted to the Congress, unless during such sixty-day period a joint-resolution is enacted disapproving such plan.").

Thereafter, the Tribe's General Council established specific programs to be funded by the award. It created programs to assist with school clothing, burial expenses, elder care, and educational expenses. Many of those programs contained the following eligibility requirement: "[The applicant] must be an enrolled member of the Seminole Nation of Oklahoma who has been determined to have descended from a member of the Seminole Nation as it existed in Florida on September 18, 1823." E.g., Aple. Supp. App. at 77. Because the Estelusti were not expressly recognized as members of the Tribe until the Treaty of 1866, Estelusti descent would not satisfy this requirement. Although the Tribe would accept a person's CDIB card as proof of descent "from a member of the Seminole Nation as it existed in Florida . . . [in] 1823" (even though CDIB cards are issued with reference to the Seminole Blood Roll created in 1906), most Estelusti were unable to obtain CDIB cards because of the BIA's CDIB-issuance policy. Thus, the Tribe's program-eligibility requirements and the BIA's CDIB-issuance policy combined to exclude most Estelusti from participation in judgment-fund programs. In an effort to gain access to these programs, Plaintiffs initiated this litigation challenging both the program-eligibility requirements and the BIA's CDIB-issuance policy.

II. Course of Proceedings

Plaintiffs named the United States, the Department of the Interior, the Bureau of Indian Affairs, and officials of both agencies as defendants in this action. They did not, however, name the Tribe or its officials. Plaintiffs sought to compel Defendants to require the Tribe to distribute judgment funds in a nondiscriminatory manner, and/or to condition further release of judgment-fund money on compliance with a nondiscriminatory distribution policy. They also requested an order requiring the BIA to issue CDIB cards to members of the Plaintiff-bands who applied.

The district court initially dismissed Plaintiffs' claims because it found the absent Tribe to be an indispensable party whose sovereign immunity prevented its joinder. On appeal in Davis 1 we held that (1) with respect to the judgment-fund claims, the Tribe was in fact a necessary party but was not necessarily an indispensable one, and (2) with respect to Plaintiffs' CDIB-card claims, dismissal on the basis of indispensability was inappropriate because the issue was not adequately addressed below. On remand the district court again found the Tribe indispensable to litigation of the judgment-fund claims, but dismissed the CDIB-card claims on another basis failure to exhaust administrative remedies.

Plaintiffs challenge both dismissals on appeal. We address each in turn.

III. Judgment-Fund Claims

The district court dismissed Plaintiffs' judgment-fund claims because an indispensable person, the Tribe, could not be joined as a party. Federal Rule of Civil Procedure 19 requires the district court to perform a two-step analysis before dismissing a claim for failure to join an indispensable

person. *See Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1411 (10th Cir. 1996).

First, the court must determine whether the absent person is "necessary." *Id.* A person is "necessary" under Rule 19(a) if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (1) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). A necessary person must be joined as a party if joinder is feasible. *Id.* If a necessary person cannot be joined, the court proceeds to the second step, determining "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, [because] the absent person . . . [is] indispensable" to the litigation at hand. Fed. R. Civ. P. 19(b).

In *Davis I* we affirmed the district court's determination that the Tribe was a necessary person. We held that "[t]he Tribe's claimed interest in determining eligibility requirements and adopting ordinances embodying those requirements is neither fabricated nor frivolous. The disposition of Plaintiffs' Judgment Fund Award claim in the Tribe's absence will impair or impede the Tribe's ability to protect its claimed interest." 192 F.3d at 959.

The Tribe's sovereign immunity prevented its joinder as a party. Thus, the district court's task on remand was to determine whether the Tribe was indispensable to this litigation or whether the case could proceed without it. In making this determination, the court was to consider, "in a practical and equitable manner," *Rishell*, 94 F.3d at 1412, the following factors:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; [and] fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). This list of factors is not, however, exclusive. *See Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986) (the "four factors are not rigid, technical tests, but rather guides to the overarching equity and good conscience determination" (internal quotation marks omitted)); 7 Charles Alan Wright et al., Federal Practice and Procedure § 1608 at 91 (3d ed. 2001) ("the list in [Rule 19(b)] does not exhaust the possible considerations the court may take into account; it simply identifies those that will be most significant in most cases").

A district court's indispensability determination under Rule 19 will not be disturbed absent an abuse of discretion. *See Rishell*, 94 F.3d at 1410-11. Its underlying legal conclusions, however, are reviewed de novo. *Davis I*, 192 F.3d at 957. The court abuses its discretion in making an

indispensability determination when it fails to consider a relevant factor, relies on an improper factor, or relies on grounds that do not reasonably support its conclusion. *See Rishell*, 94 F.3d at 1411; *cf. Thunder Basin Coal Co. v. Southwestern Pub. Serv. Co.*, 104 F.3d 1205, 1211 (10th Cir. 1997) (weight to be accorded each factor is matter for district court's discretion).

In *Provident Tradesmens Bank and Trust Co. v. Patterson*, 390 U.S. 102 (1968), the Supreme Court described the Rule 19(b) factors as representing four distinct interests: (1) "the interest of the outsider whom it would have been desirable to join," *id.* at 110; (2) the interest of the defendant in avoiding "multiple litigation, . . . inconsistent relief, or sole responsibility for a liability he shares with another," *id.*; (3) "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies[,] . . . settling disputes by wholes, whenever possible . . . ." *id.* at 111; and (4) the plaintiff's interest in having a forum in which to present the claims, *id.* at 109.

In this case the district court weighed the Rule 19(b) factors and found that the Tribe was an indispensable person with respect to Plaintiffs' judgment-fund claims. It explained that while the lack of an alternate forum "weigh[ed] heavily" in favor of retaining the case, *Davis II*, 199 F. Supp. 2d at 1178, "the prejudice to the absent Tribe, the Court's inability to lessen the prejudice[,] and the absence of an adequate remedy without the Tribe's joinder [because of the possibility that Defendants would be subjected to repeated litigation and conflicting judgments] prevent[ed] proceeding in equity and good conscience [without the Tribe]," *id.* In other words, the court found that the first three factors supported dismissal to such an extent that the fourth factor was overcome.

Plaintiffs contend that the district court erred in both its analysis of the individual Rule 19(b) factors and in its weighing of those factors. First, they argue that the district court failed to recognize that the Tribe's interest - which Plaintiffs characterize as "the right to exclude its black citizens from enjoyment of the Judgment Fund," Aplt. Br. at 16 - is not a "legally cognizable interest," *id.* Plaintiffs assert that given the absence of a legally cognizable interest, either (1) the Tribe was never a necessary person and consequently cannot be regarded as an indispensable one, or (2) in weighing the first Rule 19(b) factor - potential prejudice to the absent person or the parties - the court should have recognized that an interest that is not legally cognizable cannot be legally prejudiced. Also with respect to the first factor, they argue that the district court should not have considered potential prejudice to Defendants because such prejudice is entirely speculative. Regarding the second Rule 19(b) factor - whether "prejudice can be lessened or avoided" - Plaintiffs claim that the absence of prejudice moots the issue.

In addition, Plaintiffs take issue with the district court's analysis of the third factor "whether a judgment rendered in the person's absence will be adequate." Fed. R. Civ. P. 19(b). They contend that a judgment in the Tribe's absence would be adequate because in the event that the BIA stopped disbursing the funds to the Tribe, one of two things would happen: either the Tribe would quickly change its requirements, or it would no longer have funds to distribute in a discriminatory manner. In either event, the discriminatory disbursement would cease "immediately and unequivocally." As for the fourth factor whether adequate relief can be obtained in an alternate forum - Plaintiffs assert that while the district court correctly concluded that this factor weighed against dismissal, it placed far too little emphasis on its conclusion. Finally, they claim that the

district court erroneously failed to consider equitable factors not specifically listed in Rule 19(b). We proceed to discuss each challenge.

A. Factor 1: Prejudice to the Tribe or the parties

1. The Tribe's Interest

Plaintiffs challenge the district court's conclusion that the Tribe's interest would be prejudiced if the case were to proceed in its absence. They describe the Tribe's interest as an "interest in excluding the Estelusti from the Judgment Fund," Aplt. Br. at 21, and argue that such an interest is legally frivolous when evaluated in light of the district court's alleged findings that (1) "Congress intended the Judgment Fund to benefit all members of the Seminole Nation, including the Estelusti," and (2) "the BIA colluded with certain Tribal leaders to exclude the Estelusti from enjoyment of the Judgment Fund." Aplt. Br. at 15. They assert that the illegitimacy of the interest is significant because (1) without a legitimate interest, the Tribe is not a necessary person and thus cannot be an indispensable one; and (2) an illegitimate interest cannot be legally prejudiced under the first Rule 19(b) factor.

We reject the challenge. Plaintiffs' argument amounts to asking us to decide that the Tribe's "interest" is not worthy of consideration because its position is wrong on the merits. But Rule 19's concern is with a "claimed interest." Fed. R. Civ. P. 19(a) (emphasis added). "[T]he underlying merits of the litigation are irrelevant" to a Rule 19 inquiry, *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001), at least unless the claimed interest is "patently frivolous." *Davis I*, 192 F.3d at 959 (internal

quotation marks omitted). In *Davis I* we responded as follows to virtually the same argument that Plaintiffs make here:

> Plaintiffs' narrow interpretation of the term "legally protected interest" inappropriately presupposes Plaintiffs' success on the merits. Under the interpretation advanced by Plaintiffs, the Tribe would have no legally protected interest in the monies used to fund Judgment Fund Programs that exclude the Estelusti Seminoles only if Plaintiffs prevail on the merits. Consequently, if this court adopted Plaintiffs' interpretation of the term "legally protected interest," the district court would be required to determine the merits of Plaintiffs' Judgment Fund Award claim before ruling on Defendants' motion to dismiss. Such an approach is untenable because it would render the Rule 19 analysis an adjudication on the merits.

Davis I, 192 F.3d at 958. *Davis I* made this statement in the context of Rule 19(a). We are now addressing the issue in the context of Rule 19(b). The same reasoning applies here, however, because the prejudice inquiry under Rule 19(b) "is essentially the same as the inquiry under Rule 19(a)(2)(i) into whether continuing the action without a person will, as a practical matter, impair that person's ability to protect his interest." *Enter. Mgmt. Consultants, Inc. v. Hodel*, 883 F.2d 890, 894 n.4 (I 0th Cir. 1989). Even if our prior decision on the Rule I 9(a) issue is not strictly speaking the law of the case with respect to the Rule 19(b) issue, *see Weston v. Harmatz*, 335 F.3d 1247 (10th Cir. 2003), we see no reason to abandon here the cogent reasoning in *Davis I*.

W e note that in some cases the interests of the absent person are so aligned with those of one or more parties that the absent person's interests are, as a practical matter, protected. *See, e.g., Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1260 (10th Cir. 2001); *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001). Here, however, the district court explicitly found that "[t]he BIA is not representing the Seminole Nation's interest in this lawsuit," *Davis II*, 199 F. Supp. 2d at 1176, and Plaintiffs do not challenge that finding on appeal.

2. Defendants' Interests

Plaintiffs argue that the district court should not have considered the risk of subjecting Defendants to inconsistent legal obligations because such obligations are entirely speculative. Specifically, they point out that the BIA need not comply with a Tribal regulation that might conflict with a ruling in favor of the Estelusti. More important, however, is that the Tribe would not be bound by the judgment in this case and could initiate litigation against Defendants if the BIA withheld funds. Thus, Defendants might well be prejudiced by multiple litigation or even inconsistent judgments if this litigation were to proceed without the Tribe. *See Patterson*, 390 U.S. at 1 10 (defendant's interest in avoiding multiple litigation is proper consideration under Rule 19(b)).

This possibility is not speculative. Plaintiffs themselves recognize the substantial likelihood of subsequent litigation when they state (while addressing another issue): "[T]he Tribe reacts swiftly when the BIA cuts off federal funding.... The notion that [the] Tribe will not react to losing access to the $56 million Judgment Fund is absurd." Aplt. Br. at 26.

We conclude that the district court did not abuse its discretion in determining that under Rule 19(b), both the Tribe and Defendants have interests that would likely be prejudiced by litigation in the Tribe's absence.

B. Factor 2: Whether potential prejudice can be lessened or avoided.

In their opening brief Plaintiffs raise only one challenge to the district court's analysis of the second Rule 19(b) factor - the extent to which any "prejudice can be lessened or avoided." They argue that the factor is irrelevant because any prejudice to the Tribe is not legally cognizable. As previously discussed, this argument goes to the merits of their claim, rather than the potential harm to the Tribe if Defendants lose. Their challenge, therefore, must fail. We find no error in the district court's determination that this factor supports treating the Tribe as an indispensable party. (Although Plaintiffs in their reply brief also argue that "any prejudice could be easily prevented by the fashioning of a decree against the BIA only," Reply Br. at 10-11, we do not address that argument because it was not timely raised. *See Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000) ("This court does not ordinarily review issues raised for the first time in a reply brief.").)

C. Factor 3: Whether an adequate judgment can be entered in the Tribe's absence

Plaintiffs contend that the third Rule 19(b) factor - "whether a judgment rendered in the person's absence will be adequate" - did not support dismissal because the court could have afforded them complete relief without joining the Tribe. Plaintiffs, however, misconstrue the nature of the adequacy inquiry. The Supreme Court has explained that Rule 19(b)'s third factor is not intended to address the adequacy of the

judgment from the plaintiff's point of view. *See Patterson*, 390 U.S. at 111 ("[T]he plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them."). Rather, the factor is intended to address the adequacy of the dispute's resolution. *See id.* The concern underlying this factor is not the plaintiff's interest "but that of the courts and the public in complete, consistent, and efficient settlement of controversies," that is, the "public stake in settling disputes by wholes, whenever possible." *Id.* As previously discussed, a judgment rendered in the Tribe's absence could well lead to further litigation and possible inconsistent judgments. That judgment, therefore, would be "inadequate." Consequently, the district court appropriately found that the third Rule 19(b) factor favored dismissal.

D. Factor 4: Availability of an adequate remedy in another forum/Balancing the Factors

In addressing the fourth Rule 19(b) factor, the district court found that Plaintiffs would not have an adequate remedy if this case were dismissed. The court noted that Plaintiffs could pursue their claim "through the Tribe's legislative or judicial bodies, [but] recogniz[ing] the reality of these options, . . . it will be futile for the [Estelusti] to seek adjudication in these tribal forums." *Davis II*, 199 F. Supp. 2d at 1 180. Defendants do not challenge this finding. The issue here, then, is not whether an adequate remedy can be found elsewhere, but only the weight to be given this factor.

Plaintiffs assert that the fourth Rule 19(b) factor is so important that after having found that it weighed against a finding of indispensability, the district court should have retained the case despite its findings with respect to factors one through three. We have described the fourth factor as

"perhaps [the] most important," *Sac & Fox*, 240 F.3d at 1260, and have stated that "[t]he absence of an alternative forum . . . weigh[s] heavily, if not conclusively against dismissal," *Rishell*, 94 F.3d at 1413 (internal quotation marks omitted).

On the other hand, we have also recognized a "strong policy . . . favor[ing] dismissal when a court cannot join a tribe because of sovereign immunity" *Davis I*, 192 F.3d at 960. In fact, we have stated that "[w]hen . . . a necessary party . . . is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Enter. Mgmt.*, 883 F.2d at 894 (internal quotation marks omitted). The D.C. Circuit has explained:

> Although we are sensitive to the problem of dismissing an action where there is no alternative forum, we think the result is less troublesome in this case than in some others.... This is not a case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.

Wichita & Affiliated Tribes of Oklahoma, 788 F.2d at 777. As illustrated by our decision in *Sac & Fox*, however, this does not mean that balancing can be completely avoided simply because an absent person is immune from suit. *See Davis I*, 192 F.3d at 960. What it means is that the plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit.

Here, the district court found "compelling" the unavailability of an alternative forum and recognized that generally, such unavailability "weigh[s] heavily, if not conclusively against dismissal." *Davis II*, 199 F. Supp. 2d at 1178 (internal quotation marks omitted). But it found that in this case Plaintiffs' interest in having a forum was outweighed by the other interests to be considered in the Rule 19(b) analysis. When viewed in light of the Tribe's sovereign immunity and the first three Rule 19(b) factors, we do not believe that the absence of an alternative forum weighs so heavily against dismissal that the district court abused its discretion in deciding not to retain Plaintiffs' case.

E. Other Equitable Factors

Plaintiffs' final challenge to the dismissal of their judgment-fund claims is that in making its Rule 19(b) determination "in equity and good conscience," the district court should have considered factors other than those specifically listed in Rule 19(b). *See Wichita & Affiliated Tribes of Oklahoma*, 788 F.2d at 774. The flaw in this challenge is that the additional factors proposed by Plaintiffs are merely recharacterizations of factors already considered. First, Plaintiffs claim that "[o]nce the district court determined that the BIA had deliberately evaded Congressional intent on the basis of racial animus, the BIA's arguments for dismissal lose any remaining force . . . [and] are exposed, not as legitimate Agency positions or policy arguments, but as an effort to avoid judicial scrutiny of its unlawful and inequitable conduct." Aplt. Br. at 28 (internal citation omitted). We question Plaintiffs' description of the district court's opinion. But in any event, this argument amounts to no more than a restatement of Plaintiffs' argument with respect to the legitimacy of the Tribe's interests, an argument that we have rejected because it goes to the substantive merits of the litigation.

Next, Plaintiffs argue that "the abuses long suffered by the Estelusti at the hands of the Tribe and the BIA favor allowing them the opportunity to resolve their claims, even if the district court believed that its rulings would be ultimately ineffective against the Tribe, or that the BIA would be placed in a difficult position." *Id.* In essence, this is a reassertion of the argument that Plaintiffs should be afforded this forum because their interests outweigh the countervailing interests of the Tribe, Defendants, and the courts. This argument, however, has also been rejected.

In sum, the district court did not abuse its discretion in determining that Plaintiffs' judgment-fund claims could not, in equity and good conscience, proceed in the absence of the Tribe.

IV. CDIB-Card Claims

The district court dismissed Plaintiffs' CDIB-card claims for failure to exhaust administrative remedies under the BIA's regulations. The parties disagree as to whether the claims were dismissed under Fed. R. Civ. P. 12(b)(1) or 12(b)(6). Rule 12(b)(1) provides for challenges to the court's subject-matter jurisdiction, while Rule 12(b)(6) provides for motions to dismiss the complaint for "failure to state a claim upon which relief can be granted." Dismissals under either rule are generally reviewed de novo. *MacArthur v. San Juan County*, 309 F.3d 1216, 1220 (10th Cir. 2002) (12(b)(6)), *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995) (12(b)(I)). If, however, the district court's ruling under Rule I2(b)(I) includes findings of jurisdictional facts, those findings are reviewed for clear error. *Holt*, 46 F.3d at 1003.

In their opening brief Plaintiffs assert only one challenge to the dismissal of their CDIB-card claims: that the dismissal was foreclosed by our holding in *Davis I* that "[t]he

allegations in Plaintiffs' complaint are sufficient to resolve the jurisdictional issues in favor of Plaintiffs." 192 F.3d at 954 n.1. Plaintiffs acknowledge that in *Davis I* we said that "[o]n remand and by proper motion to the district court, Defendants may challenge the allegations made in the complaint and request that the district court make factual findings necessary to resolve any jurisdictional issues." *Id.* But Plaintiffs claim that Defendants never made that request. We disagree.

Defendants moved for dismissal under both Rule 12(b)(1) and Rule 12(b)(6). Whereas a motion under Rule 12(b)(6) challenges only the sufficiency of the complaint, *see MacArthur*, 309 F.3d at 1221, a motion under Rule 12(b)(1) "may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends," *Holt*, 46 F.3d at 1003. A review of Defendants' district court brief makes clear that in moving to dismiss Plaintiffs' CDIB-card claim, Defendants challenged not just Plaintiffs' allegations of jurisdiction but also the facts underlying those allegations. The Introductory Statement in Defendants' brief below contains the following passage:

> With respect to the claim that Plaintiffs were wrongfully denied CDIB cards, the Court should dismiss the case and/or grant summary judgment in favor of the Federal Defendants because of: 1) failure to exhaust administrative remedies, 2) failure to state a claim, and also because 3) the Federal Defendants possess sovereign immunity which has not been waived and the court otherwise lacks subject matter jurisdiction. Despite Sylvia Davis' claim that she applied for a CDIB for her son, Donnell Davis, BIA records do not disclose that either of the two individual

> Plaintiffs ever made any application for a CDIB card. Ms. Davis has presented no documentary evidence or record supporting her allegations.

Aplt. App. at 192-93 (internal citation omitted). Later, in the portion of the brief entitled "The Action Should Be Dismissed As To the CDIB Issues Because There Is No Final Agency Action Permitting Any Review of a Purported Claim Under the APA," Defendants said, "Because there is *no evidence* that the individual Plaintiffs have even applied for a CDIB card, the Plaintiffs' failure to exhaust administrative remedies deprives this court of jurisdiction and the claims should be dismissed," Aplt. App. at 218 (emphasis added).

Moreover, the district court, which can sua sponte question subject matter jurisdiction, *see Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1240 (10th Cir. 2001), clearly confronted the issue. Its opinion states:

> [T]he Court finds plaintiffs have not demonstrated the Court has jurisdiction over their CDIB claim pursuant to the APA. The Court finds plaintiffs have not complied with the established administrative procedures which would render their CDIB card claim ripe for appeal. Although plaintiffs allege they completed and submitted applications for CDIB cards and the BIA failed to act, there remain administrative procedures that must be followed. Plaintiffs have not demonstrated they have complied with the provisions established for appealing inaction of an official. *The record is void of any evidence* that plaintiffs ever requested in writing that

> the BIA take action on their CDIB card applications.

Davis II, 199 F. Supp. 2d at 1180 (emphasis added). Because Defendants' motion challenged the facts underlying Plaintiffs' allegations of jurisdiction, the district court's resolution of that motion was not foreclosed by our holding in *Davis I*, which addressed only the sufficiency of the allegations themselves.

Plaintiffs respond that even if Defendants' motion to dismiss is properly construed as a motion under Rule 12(b)(1), the district court was nevertheless precluded from considering information beyond the allegations of the complaint. Consideration of such information, they claim, would have converted the motion into one for summary judgment. But, they point out, "The district court clearly did not grant summary judgment on the CDIB card claim; it dismissed the claim without prejudice." Aplt. Reply Br. at 16.

Again, their argument is misconceived. When a party challenges the allegations supporting subject-matter jurisdiction, the "court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts." *Holt*, 46 F.3d at 1003. "In such instances, a court's reference to evidence outside the pleadings does not convert the motion [to dismiss] to a Rule 56 motion [for summary judgment]." *Id.*

We recognize that when "resolution of the jurisdictional question is intertwined with the merits of the case," it is necessary to "convert a Rule 12(b)(1) motion . . . into a [motion under] Rule 12(b)(6) . . . or . . . Rule 56." *Id.* But this is not such a case. When deciding whether jurisdiction is intertwined with the merits of a particular

dispute, "the underlying issue is whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim." *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002). The substantive issue in Plaintiffs' case is whether Plaintiffs were improperly denied CDIB cards, not whether a particular plaintiff has exhausted administrative remedies. *See id.* at 1325 (exhaustion of administrative remedies is "simply not an aspect of [a] substantive claim of discrimination"). Accordingly, we affirm the district court's resolution of Defendants' motion under Rule 12(b)(1).

To the extent that Plaintiffs raise additional challenges in their reply brief, we reject those challenges as not timely raised. *See Stump*, 211 F.3d at 533.

V. Conclusion

We AFFIRM the judgment of the district court.

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA DATED AND DECIDED APRIL 25, 2002 ("Davis II").

SYLVIA DAVIS, et al.	)	
	)	
Plaintiffs,	)	No. CIV-96-1988-M
	)	Filed: April 25, 2002
v.	)	
	)	
UNITED STATES OF AMERICA; et al.	)	
	)	
	)	
Defendants.	)	

ORDER

Before the Court is defendants' "Post-Remand Motion to Dismiss or, in the Alternative, for Summary Judgment," filed February 15, 2000 [docket no. 73]. On February 15, 2000, plaintiffs filed their "Memorandum of Law in Opposition to Defendants' Motion for Failure to Join an Indispensable Party" [docket no. 71], and on March 15, 2000, plaintiffs filed their "Memorandum of Law in Opposition to Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment" [docket no. 82]. On January 15, 2002, the Court ordered plaintiffs to file a brief explaining the bases of jurisdiction, including the requisite waiver of sovereign immunity, for each of their causes of action [docket no. 85]. On January 18, 2002, plaintiffs filed their "Supplemental Memorandum of Law Addressing the Jurisdictional Question Raised by the Court by Order Dated January 15, 2002" [docket no. 86]. On January 24, 2002, defendants filed their "Response to Plaintiffs' Supplemental Memorandum of Law Addressing the Jurisdictional Question

Raised by the Court Order Dated January 15, 2002" [docket no. 88]. The Court, having thoroughly reviewed the parties' briefs, the extensive evidentiary record, relevant cases and governing law, makes its determination herein.

I. NATURE OF THE CASE

This cause of action was filed by the Dosar Barkus Band and the Bruner Band (the "Bands," "Freedmen," "Black Seminoles," or "Freedmen Bands"), two subsections of the Seminole Nation of Oklahoma (the "Seminole Nation," the "Tribe," or "Seminole Tribe"), and Sylvia Davis as Guardian and Next Friend for Donnell E. Davis, who is a member of the Dosar Barkus Band (collectively "plaintiffs") against the United States, the Department of the Interior, the Bureau of Indian Affairs ("BIA") and numerous administrators and employees of the Department of the Interior and the BIA (collectively "defendants"). Members of these Bands are members of the Seminole Nation who are of African or mixed African/Native American ancestry. Plaintiffs did not name the Seminole Nation of Oklahoma as a defendant.

Plaintiffs allege they are entitled to receive benefits from a $56 million judgment awarded to the Seminole Tribe in 1976. The money represents reparations awarded to the Seminole Tribe arising out of a claim filed by the Seminole Tribe against the United States for tribal lands taken in 1823 ("Judgment Fund" or "Judgment Fund Award"). Plaintiffs assert they are victims of racial discrimination and have been illegally excluded from participating in the Judgment Fund Award and programs funded by the same. Plaintiffs further assert they are entitled to receive Certificate of Indian Blood cards ("CDIB cards"), which entitle the cardholder to receive various benefits provided by the Seminole Nation. Plaintiffs allege the BIA has denied issuance of CDIB cards to members of the Seminole Nation who are of African descent.

Plaintiffs seek both declaratory and injunctive relief. Plaintiffs request the Court order defendants to require the Seminole Nation to allow them to participate in the Judgment Fund Award and to provide plaintiffs benefits deriving from the Judgment Fund Award in a nondiscriminatory manner on the same basis that such benefits are provided to other members of the Seminole Nation. Plaintiffs further request the Court order defendants to deem them eligible for CDIB cards.

II. HISTORICAL BACKGROUND[1]

A. Seminole Nation

The Seminole Nation is an Indian tribe comprised of people of both Native American and African descent. The Seminole Nation was formed after the European conquest of America. The members of the Seminole Nation who are of African descent are the descendants of African slaves who escaped the bondage of slavery and who resided among several Native American groups living in what is now known as Florida. The Seminoles are unique among Indian tribes in that they were not aboriginal. Instead, they are an entirely post-European phenomenon. The Seminoles were comprised of various separatists, secessionists and runaways from a variety of ethnic, political and linguistic Native American and African groups.

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[1] The Court's recitation of the history of the Black Seminoles, as members of the Seminole Nation, is taken from the parties' evidentiary submissions.

B. Black Seminoles

The Black Seminoles are descendants of African slaves. The African slaves, attempting to gain their freedom, escaped from Southern and Carribean slave masters in the 18th and 19th Centuries to present-day Florida. These escaped slaves became a part of the Native American culture, assimilating with the Native Americans that were inhabiting the area. The Black Seminoles contributed to the Native American culture acting as warriors, interpreters, negotiators and spies for them. They even dressed in Native American fashion. While some of the escaped slaves lived nominally as slaves of the Native Americans, many lived as free men and women. The Black Seminoles lived in their own villages, tilled their own fields, carried guns, were entrepreneurs and were homeowners.

It was in the 18th Century that this diverse group of Native American and African people, speaking several Native American and African languages, became known as "Seminoles." The People of African descent became known in the Seminole tongue as "Estelusti," which translates to "Black Seminoles."

Following the Civil War, the Black Seminoles were emancipated by the Thirteenth Amendment of the United States Constitution. Thereafter, all Black Seminoles (both those who had been slaves and those who had not) became known as "Freedmen."

C. Seminole Tribe Removal

Florida became a United States territory in 1821. Two years later, in the 1823 Camp Moultrie Treaty, Seminole lands in Florida were ceded to the United States. As a result of this transfer, the Seminoles, including the Black Seminoles, were forcibly removed from their home in

Florida to what is present- day eastern Oklahoma. This forced removal, which occurred from 1838-1842, has come to be known as the "Trail of Tears." A small number of Seminoles continue to reside in Florida.

D. The 1866 Treaty

In 1866, the Seminoles and the United States entered into the Treaty of March 21, 1866, 14 Stat. 755 ("1866 Treaty"). The 1866 Treaty contains the following provision:

> inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color, who may be adopted as citizens or members of said tribe.

The 1866 Treaty is the genesis of the formal recognition of plaintiffs' ancestral membership in the Seminole Nation.

Although the 1866 Treaty formally recognized plaintiffs' ancestors as members in the Seminole Nation who were to "have all the rights of native citizens," the Dawes Commission created two separate rolls for the Seminole Nation (the "Dawes Rolls").[2] The Dawes Rolls separated the

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[2] Congress created the Dawes Commission in 1893 to create authoritative membership rolls for all Native American tribes in Oklahoma.

Seminoles into two categories. The Seminoles of African descent were included in the "1906 Seminole Freedmen Roll," while the non-African descent Seminoles were included in the "1906 Seminole Blood Roll." A Seminole who was half Native American and *half African* was counted as a Freedman, while a Seminole who was merely one quarter Native American (but *three quarters white*) was included on the Blood Roll. The Dawes Commission made no effort to quantify and record the percentage of Native American blood of those listed on the Freedmen Roll, though many historians agree that many of those listed on the Freedmen Roll had mixed Native American ancestry. The Dawes Rolls are still considered the authoritative benchmark for determination of membership in the Seminole Nation.

E. Judgment Fund Award

In 1950 and 1951, the Seminole Nation and the Florida Seminoles filed separate claims with the Indian Claims Commission, seeking compensation for tribal lands in Florida ceded to the United States in 1823. On April 27, 1976, twenty-six years later, the Indian Claims Commission ruled in favor of the Seminoles and awarded $16 million to the "Seminole Nation as it existed in Florida on September 18, 1823." *Seminole Nation of the State of Florida and Seminole Nation of Oklahoma v. United States*, 387 Ind. Cl. Comm. 91 (Dockets 73 and 151). With interest, the judgment funds totaled approximately $56 million and were appropriated by Congress in the Act of June 1, 1976, 90 Stat. 597, 629.

Following the favorable Judgment Fund ruling, the BIA issued its "Research Report on the Seminole Judgment in Dockets 73 and 151 before the Indian Claims Commission" ("Results of Research Report"), in which the BIA advised Congress on how the funds should be fairly distributed. The Results of Research Report concluded that

the Black Seminoles were not eligible to share in the Judgment Fund Award. On November 26, 1976, the BIA disclosed the results of its report in a memorandum to the Eastern Area and Muskogee Area Directors. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss for Failure to Join an Indispensable Party, Exhibit A. The Results of Research Report discussed, in significant detail, the background of the Seminole Judgment in Dockets 73 and 151 and pertinent aspects of early Seminole history and culture. This report was later submitted to and extensively relied upon by Congress. The Results of Research Report represents the first evidence that the BIA intended to exclude the Black Seminoles from the benefits of the Judgment Fund Award. Realizing that it needed to reconcile the problem of the Black Seminoles' enrollment on the "Dawes Commission Roll" as "citizens," but not "by blood," and the Seminole Nation of Oklahoma Constitution which made no such distinction and provided that membership consists of "all Seminole citizens whose names appear on the final rolls of the Seminole Nation of Oklahoma ...," the BIA identified what it envisioned would be two fundamental problems that it would have to overcome if the Black Seminoles were to be excluded. Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit A at 9-10. "Two very fundamental enrollment problems, ..., must be recognized in the context of handling the judgment funds: (1) 'Seminole citizens' include the Freedmen; and (2) the Seminole Nation had no provisions for constructing a current roll until after the filing of their claim in Docket 151." Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit A at 10.

Despite acknowledging the inclusion of the Black Seminoles as citizens in the Seminole Nation of Oklahoma, the Results of Research Report concluded "all Seminole Negroes and their descendants, including living Freedmen and their descendants who are eligible for membership in the modern Seminole Nation of Oklahoma, to be ineligible to

participate in the subject award." Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit A at 11. While the BIA took the position that the Black Seminoles should be excluded as beneficiaries of the Judgment Fund Award, it was equally aware that such an exclusionary plan would not receive the required Congressional vote. As further evidence of the BIA's position, Rosella C. Garbow, BIA Tribal Operations Officer, wrote in a memorandum, dated May 4, 1990, "[w]e sincerely believe that should a plan be submitted to Congress that excludes the Seminole Freedmen, who are currently members of the [T]ribe, a joint resolution will be enacted by Congress disapproving such a plan." Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit B at 1-2. As evidenced by Garbow's additional statements in the May, 1990 memorandum, this was an urgent matter to the BIA. Garbow further wrote:

> We need some clarification regarding this matter immediately as tribal employees have informed us that most of the persons inquiring about the status of this Act are Seminole Freedmen. We have already attended meetings to discuss the formulation of a tribal plan. This is the predominant concern of most of the Seminole by blood members, and has to be addressed before any meaningful tribal disbursement plan can be prepared.

Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit B at 2 (emphasis added). Realizing its exclusionary proposal would not be approved by Congress, the BIA assisted the Seminole Nation in formulating a plan that could prevent the Black Seminoles' participation in the Judgment Fund Award and still receive Congressional approval. *See* Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit C.

In 1990, Congress passed the "Indian Claims Distribution of Funds to Seminole Indians," 104 Stat. 143 (1990) (the "Distribution Act") setting forth criteria for the use and distribution of the Judgment Fund Award.[3] The Distribution Act delegated the responsibility to the Seminole Nation of Oklahoma to prepare a distribution plan for its 75% share of the Judgment Fund Award. However, the provisions of the Distribution Act did not directly address the Black Seminoles' entitlement to share in the tribal programs. The Act provided that "not less than 80 per centum thereof shall be set aside and programmed to serve common tribal needs, educational requirements, and such other purposes as the circumstances of the Seminole Nation of Oklahoma may determine." Distribution Act § 4(a). Despite the directive to utilize the funds for common tribal needs, educational requirements and other such purposes, the BIA and the Seminole Nation sought to exclude the Black Seminoles as beneficiaries of these programs. *See* Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit G at 3.

On June 28, 1990, during a visit to Wewoka by Garbow, Chief Jerry Haney[4] held a meeting in his office in which Ross Swimmer[5] participated via telephone. The

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[3] Despite the BIA's submission of its Results of Research Report in 1976, the political dispute over the appropriate division between the Seminoles in Florida and the Seminole Nation of Oklahoma prevented any legislation or plan for distribution or expenditure until the 1990 Act, some 14 years later.

[4] The Court was unable to determine from the record Chief Jerry Haney's title, but believes Chief Haney is the Chief of the Seminole Nation.

[5] The Court notes that it was unable to determine from the record Ross Swimmer's title.

exclusion of the Black Seminoles from participation in the Judgment Fund Award was discussed. *See* Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit E. Swimmer stated a usage plan excluding the Black Seminoles would probably pass because the "taking" of Seminole lands occurred in 1823, and the Black Seminoles were not formally recognized citizens of the Seminole Nation at that time. Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit E. He also stated all of the members of Congress were aware of the facts surrounding the taking and the proposal would pass even though the Black Seminoles were not included. *See* Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit E. Following the conference call, the parties held a "serious discussion" on whether or not the Black Seminoles should share as beneficiaries in the Judgment Fund Award in some form.[6] Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit E.

On September 4, 1990, Garbow again visited Wewoka, Oklahoma. In her report of the visit, dated September 10, 1990, Garbow stated the purpose of the trip was to meet with the Seminole Judgment Fund Committee[7] to discuss a tentative tribal proposal for the use and distribution of judgment funds awarded to the Seminole Nation of Oklahoma under Dockets 73 and 151. *See* Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit D. During the

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[6] The parties even discussed including the Black Seminoles as beneficiaries just not equally with the Seminoles by blood. *See* Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit E.

[7] Although the Freedmen Bands were two of the recognized 14 Bands that comprise the Seminole Nation of Oklahoma, the Seminole Judgment Fund Committee specifically excluded representation of the Freedmen Bands. *See* Defs.' Post Remand Mot. Dismiss at 12, Exhibit 9.

meeting, the exclusion of the Black Seminoles was the predominant subject. Garbow's report stated "[t]he Freedman issue is a very sensitive matter, and the Committee does not want to include them in the usage plan." Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit D. During that meeting, Janet Spaulding, Solicitor's Office, Tulsa, Oklahoma, made several comments on the "options/choices" that the Seminole Nation had regarding the exclusion of the Black Seminoles. Her comments reflect the exclusionary intent of the Seminole Nation and the BIA's assistance to the Seminole Nation in the exclusion of the Black Seminoles from participating in the Judgment Fund Award. Spaulding advised the Seminole Nation that there was the "possibility of the plan slipping through if Congress [was] busy with the Middle East crises on their mind." Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit D. She further advised the Seminole Nation that it would perhaps be subject to a lawsuit no matter what it decided to do. Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit D. "If the Seminoles are sued, the Courts will determine what was the intent of Congress in using language members by blood or members of the Seminole Nation. Congress might look at past legislation which states members by blood." Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit D. In that same meeting, a member of the Judgment Fund Committee suggested allowing the time to prepare the usage plan to expire so that the BIA would be forced to prepare the plan. *See* Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit D. Spaulding discouraged this thinking by stating if the Black Seminoles sued the BIA as a result of the usage plan, "the money could be tied up until something was resolved." Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit D.

Ultimately, the Tribe voted to exclude the Black Seminoles from benefitting from the Judgment Fund Award. The Seminole Nation General Council approved the Seminole Nation Usage Plan (the "1991 Usage Plan") on

October 20, 1990. It was submitted to Congress on January 30, 1991, and became effective 60 days later, on or about March 30, 1991, as provided in Section 4(d) of the Distribution Act. Following Congressional approval of the 1991 Usage Plan, the Seminole Nation General Council passed several ordinances establishing programs to be funded by the Judgment Fund Award. The programs include an elderly assistance program, a children's clothing program, a burial program, a higher education program and a household economic assistance program.[8] Tribal resolutions authorizing each program contain eligibility requirements for participation. For example, the Tribal Higher Education Assistance Program contains the following eligibility requirement ("Eligibility Requirement"), which must be met by all persons before they are allowed to participate in the program: "The applicant must be an enrolled member of the Seminole Nation of Oklahoma who has been determined to have descended from a member of the Seminole Nation as it existed in Florida on September 18, 1823." Because the Black Seminoles were not expressly recognized as members of the Seminole Nation until the 1866 Treaty, the effect of the Eligibility Requirement is to exclude the Black Seminoles from participating in any Judgment Fund Program that conditions participation on meeting the Eligibility Requirement.

On August 7, 1991, the Area Director of the Muskogee Area Office, requested Tim Vollmann, Regional

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[8] This Court notes that the General Council Secretary refused to sign the Burial Assistance Program and the School Clothing Program ordinances. "Normally, the General Council Secretary would attest to the ordinances but the General Council Secretary refused to sign them." Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit F.

Solicitor, Southwest Region, render an opinion concerning the advisability of releasing Judgment Funds for the Seminole Nation's utilization pursuant to its exclusionary Eligibility Requirement. On August 30, 1991, Vollmann responded to the Eligibility Requirement as follows:

> The underlying question raised by this eligibility requirement concerns the rights of tribal members listed on the Freedmen Roll [the Black Seminoles] or their descendants to participate in tribal programs funded with the Indian Claims Commission judgment monies appropriated by Congress ... The question presented is whether the eligibility standards in the ordinances are consistent with the 1990 Act and the plan and are otherwise consistent with the law. You need to know this before releasing any of the judgment funds to the Seminole Nation because the courts have held that the federal government has a fiduciary duty in administering the trust funds of an Indian tribe ... we believe that the proposed definition of eligibility is acceptable.

Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit G at 1, 3, 10.

It is clear from Vollmann's August 30, 1991 memorandum that there was concern that the Eligibility Requirement "might be contrary to Congressional intent and could be seen as invidiously discriminatory." Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit G at 9. In fact, Vollmann states that his "staff counseled ... informally against releasing funds pursuant to such proposed ordinances." *Id.* Concluding that insufficient evidence existed demonstrating that Congress intended to exclude the Black Seminoles, Vollmann stated:

> the legislative history provides evidence, *but it is far from overwhelming*, that Congress intended to exclude, or to permit the exclusion, of the Freedmen from sharing in the Oklahoma Seminole's share of the award. Two considerations weigh against that reading of the legislative intent behind the 1990 Act. First, if Congress had intended to exclude the Freedmen, it certainly could have done so explicitly in light of the fact that it had previously excluded Creek Freedmen from participation in that Tribe's claim award distribution. Secondly, the language of section 4(b) of the [1990] Act requires that, before a per capita distribution of the investment income from 20% of the award principal may be made by the tribal governing authority, the Secretary must certify 'a roll of members of the Seminole Nation of Oklahoma born on or before and living on the date of enactment of this Act'. Since Freedmen, as modern members of the Tribe, would be on that roll, this is some evidence that they were considered to be beneficiaries of any per capita payment plan. It would be anomalous to consider them eligible for per capita distributions but not for tribal programs ... *Thus the reference to the Secretary's certification of a contemporary membership roll of the Seminole Nation of Oklahoma supports the proposition that the Freedmen not be excluded from participation in the benefits of the claims award, including the tribal programs.*

Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit G at 8 (emphasis added).

Vollmann, nevertheless, in the same memorandum concluded that the Eligibility Requirement was acceptable because the intent of Congress was not clearly established. *See* Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit G at 10. The language change from expressly excluding Black Seminoles to language which provided eligibility would be based on descent from a member of the Seminole Nation as it existed in 1823 made the proposed plan more acceptable to Vollmann. He stated he believed "this exercise of tribal discretion is supported by the legislative history of the 1990 Act." Pls.' Mem. Opp'n Mot. Dismiss Ind. Party, Exhibit G at 10.

Although the Distribution Act and the 1991 Usage Plan control the distribution of the Judgment Fund Award, both the BIA and the Seminole Nation play a role in the distribution of such funds. The BIA's role is to determine, prior to the release of tribal funds, whether the planned expenditures are in accordance with the Distribution Act and the 1991 Usage Plan. It is the BIA's responsibility to determine whether adequate funds are available, and process tribal requests for draw-downs from the United States Treasury. The Seminole Nation is responsible for processing applications for Judgment Fund programs and determining applicant eligibility. The Seminole Nation requires a CDIB card as a prerequisite to participation in the Judgment Fund Award.

F. Certificate of Degree of Indian Blood

A CDIB card serves as the BIA's certification that an individual possesses a specific quantum of Indian blood.[9]

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[9] The Seminole Nation of Oklahoma does not require a specific blood quantum. It stands to reason that a fully recognized member of the Seminole Nation, by the Seminole

(*continued on next page*)

The BIA does not rely on whether the applicant is a member of an Indian tribe. Rather, any person who can trace his or her ancestry to a Seminole Indian listed on the Dawes Rolls is entitled to receive a CDIB card on application. The burden of proving Indian ancestry rests upon the applicant.

III. PROCEDURAL BACKGROUND

A. The Case At Bar

On January 16, 1996, plaintiffs filed the instant action. Plaintiffs and defendants then cross-moved for summary judgment. Defendants additionally moved for dismissal on various procedural grounds, including Federal Rule of Civil Procedure 19. On March 20, 1998, the Court granted defendants' motion to dismiss, holding the Seminole Nation was an indispensable party that cannot be joined on account of sovereign immunity.[10]

Plaintiffs appealed this ruling to the Tenth Circuit Court of Appeals. On September 21, 1999, the Tenth Circuit reversed this Court's order dismissing plaintiffs' CDIB claim. The Tenth Circuit further reversed this Court's order dismissing plaintiffs' Judgment Fund Award claim and remanded the matter to this Court "to conduct an analysis of all the factors articulated in Rule 19(b) and make a

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(*continued from previous page*)
Nation, may never be eligible to receive a CDIB card and therefore automatically excluded from participating in tribal benefits that require a CDIB card. This is true despite the Black Seminoles' right to participate in the tribal decision making process by voting on tribal matters.

[10] This holding applied to both plaintiffs' Judgment Fund Award claim and plaintiffs' CDIB claim.

reviewable determination as to whether the Tribe is an indispensable party with respect to Plaintiffs' Judgment Fund Award claim." *Davis v. United States*, 192 F.3d 951, 961 (10th Cir.1999).[11]

On January 4, 2000, this Court ordered the parties to submit simultaneous briefing on the issue of whether the Seminole Nation is an indispensable party. On February 15, 2000, the parties submitted those briefs. Additionally, defendants have again moved for dismissal on various procedural grounds.

B. Administrative Proceedings

On September 22, 1995, counsel for plaintiffs wrote to James Fields, Superintendent of the Wewoka Agency, BIA, alleging that Freedmen Band members were being denied CDIB cards in violation of BIA policy. On October 4, 1995, Mr. Fields responded, stating:

> [t]he Certificate of Degree of Indian Blood makes or infers no mention of Tribal Membership. The [BIA's] policy states that my responsibility is to certify [someone's] Indian blood when acceptable proof of relationship to an individual enrolled on specific rolls of particular tribes or to a person who has received a valid Certificate of Degree of Indian Blood. For the Seminole Nation, this is the index and final rolls of citizens and

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[11] In its Order, the Tenth Circuit held this Court did not abuse its discretion when it held the Seminole Nation was a necessary party whose joinder is not feasible. *Davis*, 192 F.3d at 959.

> Freedmen approved by Act of Congress on June 21, 1906.
>
> The final rolls of the Freedmen were mentioned [in the BIA policy statement] because there are persons listed on the Freedmen rolls who were part Indian. As you know, the Seminole Nation follows maternal lineage, for example, if the person's mother was a [F]reedman and the father was Indian by blood, the person was enrolled in the [F]reedmen roll. This person was still part Indian and he/she and his/her descendants would be eligible to receive a Certificate of Degree of Indian Blood. In fact, this has happened and is happening: Certificates of Degree of Indian Blood were issued and they have received benefits from judgment fund programs.

Defs.' Post Remand Mot. Dismiss, Exhibit 14, 2-3.

On October 6, 1995, counsel for plaintiffs filed a Notice of Appeal of the Superintendent's decision to the Area Director. By letter dated September 11, 1996, the decision was affirmed. The September 11, 1996 decision states, in pertinent part:

> the Superintendent's decision essentially answers the academic question of whether CDIB cards will be issued to applicants who have not presented proof of Indian Blood.
>
> A CDIB card is a certification by a BIA Agency Superintendent or a Field Representative that an individual possesses a specific quantum of Indian blood. When

> determining whether an individual CDIB applicant is entitled to receive a CDIB [card], the BIA does not rely upon whether the applicant is a member of an Indian tribe. There are persons of Indian blood who are not enrolled members of an Indian tribe. The burden of proof regarding the issuance of a CDIB [card] rests upon the individual applicant to establish lineage from Indian ancestors. When anyone, including a Freedmen Band member, applies for a CDIB card without providing acceptable documentation of descendency [from] a Seminole Indian by blood, that applicant will not be issued a CDIB card.
>
> * * * * * *
>
> The BIA has issued, and will continue to issue, CDIB cards to members of the Freedmen [B]ands and others who have provided evidence of descendency from a member shown on the Dawes Commission enrollment cards as possessing Seminole blood.

Defs.' Post Remand Mot. Dismiss, Exhibit 15 at 2,3.

On October 15, 1996, plaintiffs appealed this decision to the Interior Board of Indian Appeals in Arlington, Virginia ("Board"), where the appeal was pending at the time the Court issued its original order dismissing this case. While this case was pending with the Tenth Circuit, the Board determined that inasmuch as CDIB cards are issued only to persons, not to tribes or subsections of a tribe, the Bands were not proper appellants. The Board then directed plaintiffs' counsel to provide names of individual Band

members who had actually applied for CDIB's from the Wewoka Agency, BIA. On February 3, 1998, the Board dismissed the administrative case for lack of jurisdiction.

IV. DISCUSSION

A. Judgment Fund Award Claim

1. Rule 19(b) Analysis

If an absent party is necessary but cannot be joined, the Court must then determine "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Fed.R.Civ.P. 19(b). "A necessary party can be considered an indispensable party only if, in equity and good conscience, a court should not allow the action to proceed in the party's absence." *Sac and Fox Nation of Missouri v. Norton,* 240 F.3d 1250, 1259 (10th Cir.2001). If the Court concludes the action cannot proceed "in equity and good conscience," it must dismiss the suit.

Determining whether in equity and good conscience a suit can proceed in the absence of a necessary party requires a court to consider four factors:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). "Rule 19(b) analysis requires that the factors be evaluated in a practical and equitable manner, and be given the appropriate weight." *Rishell v. Jane Phillips Episcopal Memorial Medical Center*, 94 F.3d 1407, 1412 (10th Cir.1996). "These four factors are not rigid, technical tests, but rather guides to the overarching equity and good conscience determination." *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 774 (D.C.Cir.1986) (internal quotations and citations omitted). "This Rule 19(b) language leaves the district judge with substantial discretion in considering which factors to weigh and how heavily to emphasize certain considerations in deciding whether the action should go forward in the absence of someone needed for a complete adjudication of the dispute." *Cloverleaf Standardbred Owners Ass'n, Inc. v. National Bank of Washington*, 699 F.2d 1274, 1277 (D.C.Cir.1983) (internal quotations and citations omitted).

The party moving for dismissal based on failure to join an indispensable party bears the burden of persuasion. *Rishell*, 94 F.3d at 1411. "An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other parties to the suit without affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience." *Turner v. Brookshear*, 271 F.2d 761, 764 (10th Cir.1959). In determining whether parties not named are indispensable parties, the courts must balance the interests of plaintiffs against those of defendants and absentees. *See Francis Oil and Gas, Inc. v. Exxon Corp.*, 661 F.2d 873 (10th Cir.1981). Although there is a strong public policy that has favored dismissal when a court cannot join an Indian tribe because of sovereign immunity, "a court does not know whether a particular [party] is indispensable until it ha[s] examined the situation to determine whether it can proceed without it." *Provident Tradesmens Bank & Trust Co. v.*

Patterson, 390 U.S. 102, 119, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968).

a. To what extent a judgment rendered in the Seminole Nation's absence might be prejudicial to the Seminole Nation or those already parties

The disposition of plaintiffs' Judgment Fund Award claim without the presence of the Seminole Tribe as a party to the lawsuit will be prejudicial to the Seminole Tribe. "Conflicting claims by beneficiaries to a common trust present a textbook example of a case where one party may be severely prejudiced by a decision in his absence." *Wichita and Affiliated Tribes of Oklahoma*, 788 F.2d at 774. Plaintiffs assert the Eligibility Requirement for participation in the Judgment Fund Award is discriminatory and defendants condone this alleged discrimination each time they disperse monies from the Judgment Fund Award to the Tribe. However, it was the Tribe, through its ordinances, that *ultimately* ratified the proposal excluding the Black Seminoles from benefitting from the Judgment Fund Award. The BIA is not representing the Seminole Nation's interest in this lawsuit, and therefore, the Seminole Nation has no party to represent its interest in its programs and the distribution of its funds for those programs. As the Tenth Circuit stated:

> The record demonstrates, however, that the Tribe has developed, enacted, and sought approval of programs that are or will be financed by the Judgment Fund Award. The Tribe has determined the eligibility criteria for participation in such programs and has adopted ordinances containing the Eligibility Requirement. The Estelusti Seminoles are effectively prohibited from participating in Judgment Fund Programs because of the

> Eligibility Requirement. A ruling on the merits in favor of Plaintiffs on their Judgment Fund Award claim will have the practical effect of modifying the Tribal ordinances containing the Eligibility Requirement. Unless the Tribe is a party to the lawsuit, it has no ability to protect its claimed interest in determining eligibility requirements.

Davis, 192 F.3d at 959.

Plaintiffs request the Court issue an injunction compelling defendants to require that the Seminole Nation provide benefits deriving from the Judgment Fund Award to the Black Seminoles. A favorable judgment for plaintiffs on their judgment fund award claim would, in effect, reverse the decisions of the Tribe's governing body, and significantly interfere with the Tribe's ability to govern its programs. Essentially, the Court would be defining who is eligible for participating in tribal programs. Accordingly, the Court finds such a judgment would be highly prejudicial to the absent Seminole Nation.

b. The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided

Prejudice to the Tribe cannot be avoided. Plaintiffs seek a remedy that the Court finds, if granted, will have a prejudicial effect on the Tribe. The Court finds there is no way to shape relief that would lessen or avoid the prejudice to the absent Tribe. Plaintiffs' complaint hinges on the Eligibility Requirement established by the Tribe. No matter how the remedy is shaped, essentially the Court will be modifying the Tribe's policies and ordinances. Further, the

Court finds there are no protective provisions which could be included in the judgment which would prevent trampling on the Seminole Nation's sovereign right to make its own laws and be ruled by them. Although the Seminole Nation cannot be joined, plaintiffs' lawsuit is in effect an attack on its tribal ordinances. The Court cannot envision the construction of a remedy which would lessen or avoid the prejudice against the absent Tribe.

The Court also finds compelling the very real possibility that defendants would incur a substantial risk of inconsistent legal obligations if the BIA officials were subsequently sued by the Seminole Nation for actions taken in violation of tribal law as a result of plaintiffs' success in this cause of action. Plaintiffs seek an injunction compelling the BIA to ensure that the payments it makes to the Seminole Nation are spent "lawfully," which according to plaintiffs means being spent for benefits which are provided to the Black Seminoles on the same basis as to other Seminoles. If the Court granted the requested injunction against the BIA, such an injunction would require the BIA to take some action against the Seminole Nation's administration of its Judgment Fund Programs.

c. Whether a judgment rendered in the Seminole Nation's absence will be adequate

A judgment in favor of plaintiffs will not settle this cause of action. Plaintiffs' success in this lawsuit would not necessarily afford complete relief because a favorable decision by this Court will not have a binding effect on the absent Tribe. A judgment against defendants is not binding on the Seminole Nation, and undoubtedly would have no influence on the manner in which the Tribe runs its tribal programs. Without a binding effect, the Tribe would certainly continue to assert its authority, management

responsibilities and control of the Judgment Fund Programs via its tribal ordinances. The Court finds without the participation of the absent Seminole Nation, no practical effect will ensue from a favorable plaintiffs' decision.

d. Whether plaintiffs will have an adequate remedy if the action is dismissed for nonjoinder

Although the first three factors weigh in favor of dismissal and against the Court proceeding "in equity and good conscience," the fourth factor weighs heavily in plaintiffs' favor. Defendants assert plaintiffs can challenge the Eligibility Requirement through the Seminole Nation's own legislative and political mechanism. The Court, however, finds that this proposed avenue of relief is inadequate to address plaintiffs' claim. The Court finds plaintiffs have no alternative forum in which their claim can be heard. Requiring plaintiffs to maneuver their claim through the Seminole Nation's legislative bodies would, in effect, be futile. Conceivably, this tribal legislative body to which defendants refer is one and the same with the tribal legislative body responsible for determining eligibility for participation in and administering the Judgment Fund Award programs.

Critical to Rule 19(b) analysis is the availability or unavailability of an alternative forum. The Court finds compelling "plaintiff[s'] interest in having the federal forum," and finds strongly influential the unavailability of an alternative forum. *Pasco Intern. (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 500 (7th Cir.1980). "The absence of an alternative forum [ ] weigh [s] heavily, if not conclusively against dismissal." *Rishell*, 94 F.3d at 1413. However, despite this reasoning and the Court's belief that plaintiffs should not be prevented from having their case tried on the merits which would essentially occur if the Court determines

the case cannot proceed in the absence of the Seminole Nation, the Court finds this is the only factor weighing in plaintiffs' favor.

Having weighed the relevant factors, the Court finds that in equity and good conscience plaintiffs' Judgment Fund Award claim should not proceed among the parties before it. While the Court finds plaintiffs' forum argument persuasive, the Court finds the prejudice to the absent Tribe, the Court's inability to lessen the prejudice and the absence of an adequate remedy without the Tribe's joinder prevent proceeding in equity and good conscience. Accordingly, the Court concludes the Seminole Nation is an indispensable party to plaintiffs' Judgment Fund Award claim and that the Judgment Fund Award claim should be dismissed for nonjoinder. The Court would note, however, that its conclusion that the Judgment Fund Award claim may not proceed does not reflect any findings by the Court as to the merits of plaintiffs' Judgment Fund Award claim.

Accordingly, the Court GRANTS defendants' motion for summary judgment as to the Judgment Fund Award claim.

B. Certificate of Degree of Indian Blood

A person or persons adversely affected or aggrieved by agency action, including a failure to act, is entitled to judicial review thereof provided the agency action is final and for which there is no other remedy. *See 5 U.S.C. § 702-704*. An action is not ripe for review where no final adverse action has been taken. "The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law." *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969). "The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly

exceeded its jurisdiction." *Id.* at 194, 89 S.Ct. 1657. "It is obvious that administrative remedies must be exhausted under virtually all instances where judicial review is sought." *Harr v. Federal Home Loan Bank Board*, 557 F.2d 747, 749 (10th Cir.1977).

"Officials and agencies in their administrative chain should have an opportunity to consider the issues and claims and to so exercise their discretion before the matter is submitted to the courts." *Id.* The expertise of the administrative agency assists with developing an adequate record for judicial review. Exhaustion of administrative remedies is especially pertinent where factual issues calling for special agency expertise is present. *See Public Citizen v. Goyan*, 496 F.Supp. 364, 365 (D.D.C.1980). Further, it is the interested parties' responsibility to determine the proper procedure established by the agency.

An agency has the authority to prescribe by regulation the procedures to be followed in order to exhaust one's administrative remedies. "[An] agency may by rule require that all appellate steps be taken within the agency and that all remedies be exhausted before the applicant may seek a review in the court." *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 452 (9th Cir.1971). The BIA has established regulations which provide administrative appeal procedures for decisions of BIA officials by persons who are adversely affected by those decisions, or allege that they are legally administratively incorrect. *See* 25 CFR § 2 (1989). The regulations provide that no decision which at the time of its rendition is subject to appeal to a superior authority within the BIA shall be considered final so as to be agency action subject to review under 5 U.S.C. § 704. *See* 25 CFR § 2.6(a). Hence, exhaustion of the appeal procedures is a jurisdictional prerequisite to judicial review.

Where a plaintiff alleges the BIA has not responded or acted upon a request to the official, there are administrative procedures which govern the ability of a plaintiff to seek judicial review of that official's alleged inaction. The BIA provides administrative appeal procedures for the inaction of BIA officials. 25 CFR § 2.8(a) provides in pertinent part:

> (a) A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, can make the official's inaction the subject of appeal, as follows:
>
> > (1) Request in writing that the official take the action originally asked of him/her;
> >
> > (2) Describe the interest adversely affected by the official's inaction, including a description of the loss, impairment or impediment of such interest caused by the official's inaction;
> >
> > (3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part.

Therefore, even in the absence of requested action of a BIA official, BIA regulations still require a plaintiff to exhaust its

specified administrative procedures before requesting judicial review.

Defendants assert plaintiffs have not established this Court's jurisdiction for review because they have not exhausted their administrative remedies. Defendants assert there is no agency record or final agency action for the Court to review. Defendants further assert the historically unique and complex Indian blood degree issues in the case at bar should first be addressed by the BIA. Specifically, defendants assert two reasons plaintiffs have failed to exhaust their administrative remedies. First, there is no documentary evidence or record that the individual plaintiffs have ever applied for a CDIB card from the BIA. Second, because CDIB cards are issued to individual Indians, not political subsections of a tribe, as to the "Band plaintiffs," there is also no administrative decision for this Court to review under the Administrative Procedures Act ("APA").

Plaintiffs assert this Court has jurisdiction pursuant to the APA, 5 U.S.C. § § 702-703. Plaintiffs assert the BIA routinely and discriminatorily refuses to accept applications for or issue CDIB cards to members of the Estelusti Bands. Plaintiffs further assert several members of the plaintiff Bands have previously applied for CDIB cards, but either the BIA refused to grant the CDIB cards or failed to respond to their applications. Alternatively, plaintiffs assert they are not required to exhaust any administrative remedies or to demonstrate final agency action for four reasons. First, the pursuit of such remedies would be futile. Second, their constitutional rights are being violated. Third, the issues to be decided are purely legal issues. Finally, irreparable harm would ensue if plaintiffs' claim was dismissed.

Having carefully reviewed the parties' briefs and the applicable statutes, the Court finds plaintiffs have not demonstrated the Court has jurisdiction over their CDIB

claim pursuant to the APA. The Court finds plaintiffs have not complied with the established administrative procedures which would render their CDIB card claim ripe for appeal. Although plaintiffs allege they completed and submitted applications for CDIB cards and the BIA failed to act, there remain administrative procedures that must be followed. Plaintiffs have not demonstrated they have complied with the provisions established for appealing inaction of an official. The record is void of any evidence that plaintiffs ever requested in writing that the BIA take action on their CDIB card applications. Plaintiffs merely assert the applications were completed, but they "received no response from the BIA." Pls.' Mem. Opp'n Mot. Dismiss, or Alt. Summ. J. at 8.

Further, the Court is not persuaded that plaintiffs should be relieved of the exhaustion requirements established by the BIA. The Court finds the governmental interests in requiring exhaustion are strong in the case at bar. Because of the technical nature of the issuance of CDIB cards, the Court finds it would be beneficial first to have the BIA exercise its special expertise in the matter. Further, the interest of the BIA in administrative autonomy also supports requiring exhaustion of administrative remedies.

Accordingly, the Court GRANTS without prejudice defendants' motion to dismiss CDIB card claim.

CONCLUSION

Although the Black Seminoles may seek to have their Judgment Fund Award claim heard on the merits through the Tribe's legislative or judicial bodies, the Court recognizes the reality of these options. The Court finds it will be futile for the Black Seminoles to seek adjudication in these tribal forums. The Court's disposition as to the Black Seminoles' Judgment Fund Award claim effectively terminates the Black Seminoles' opportunity to have their Judgment Fund Claim

heard by an impartial adjudicative body; however the Court is duty bound and shall follow the law in deciding the issues before it.

For the reasons set forth above, the Court grants the following as to defendants' "Post-Remand Motion to Dismiss or, in the Alternative, for Summary Judgment," [docket no. 73]:

(1) The Court GRANTS defendants' motion for summary judgment as to plaintiffs' Judgment Fund Award claim; and

(2) The Court GRANTS defendants' motion to dismiss without prejudice as to plaintiffs' CDIB Card claim.

IT IS SO ORDERED this 25th day of April, 2002.

/s/
VICKI MILES LaGRANGE
UNITED STATES DISTRICT JUDGE

ENTERED ON JUDGMENT DOCKET
ON 4/25/02

APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND DECIDED SEPTEMBER 21, 1999 ("Davis I").

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

SYLVIA DAVIS, as Guardian and Next Friend for Donnell E. Davis; DOSAR-BARKUS BAND OF THE SEMINOLE NATION OF OKLAHOMA; BRUNER BAND OF THE SEMINOLE NATION OF OKLAHOMA,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; BRUCE BABBITT, THE HONORABLE Secretary of the Interior, his agents, employees and successors; ADA DEERE, Assistant Secretary of the Interior for Indian Affairs, her agents, employees and successors; ROY WILLIS, Superintendent, Bureau of Indian Affairs, Wewoka Agency; JIM FIELDS, Acting Superintendent, Bureau of Indian Affairs, Muskogee Agency, his agents, employees and successors,

Defendants-Appellees.

No. 98-6161

Sept. 21, 1999

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. NO. CIV-96-1988-M)

Before **ANDERSON, BRORBY**, and **MURPHY**, Circuit Judges.

MURPHY, Circuit Judge.

This appeal was brought by the Dosar Barkus Band of the Seminole Nation of Oklahoma; the Bruner Band of the Seminole Nation of Oklahoma; and Sylvia Davis, a member of the Dosar Barkus Band, on behalf of her minor child (collectively "Plaintiffs"). Defendants are the United States, the Department of the Interior, the Bureau of Indian Affairs (the "BIA"), and numerous administrators and employees of the Department of the Interior or the BIA (collectively "Defendants"). The Seminole Nation of Oklahoma (the "Tribe") was not named as a defendant.

The parties filed cross-motions for summary judgment and, in addition, Defendants filed a motion to dismiss for: (1) lack of standing; (2) failure to exhaust administrative remedies; (3) failure to join an indispensable party; (4) raising an intra-tribal dispute riot justiciable by a federal court; (5) failure to state a claim; and (6) lack of subject-matter jurisdiction. Acting on Defendants' motion to dismiss, the district court held the Tribe was an indispensable party that could not be joined on account of sovereign immunity. Thus, the district court granted Defendants' motion to dismiss for failure to join an indispensable party

stating in its memorandum order that it was not disposing of the cross-motions for summary judgment or ruling on any of the other grounds for dismissal raised by Defendants in their motion.[1] Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court reverses and remands.

I. FACTUAL BACKGROUND

A. *The Judgment Fund Award*

The Seminole Nation is an Indian tribe formed after the European conquest of America and composed of both Native American and African peoples. Some members of the Seminole Nation are descended from escaped African slaves who resided among several Native American groups living in what is now Florida. These Native American groups, together with the Africans living among them, became known as the Seminoles. The Africans were referred to in the Seminole tongue as "Estelusti."

In 1823, two years after Florida became a United States territory, Seminole lands in Florida were ceded to the

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[1] The district court did not hold an evidentiary hearing or otherwise address he jurisdictional issues raided in Defendants' motion to dismiss. Defendants reassert their jurisdictional argument in their appellate brief. When this court reviews a dismissal under Rule 12(b), however, it "must presume that the general allegations in the complaint encompass he specific facts necessary to support those allegations." *Steel Co. v. Citizens for a Better Env't*, 118 S.Ct. 1003, 1017 (1998). For the sole purpose of determining jurisdiction at this preliminary stage of the lawsuit, this court must assume that the allegations in Plaintiffs' complaint and the facts underlying those allegations are true. The allegations in Plaintiffs' complaint are sufficient to resolve the jurisdictional issues in favor of Plaintiffs. At this stage, Plaintiffs have thus met their burden of establishing standing, subject-matter jurisdiction, ripeness, and exhaustion. On remand and by proper motion to the district court, Defendants may challenge the allegations made in the complaint and request that the district court make factual findings necessary to resolve any jurisdictional issues.

United States. The Seminoles were forcibly a removed from Florida and the majority now reside in eastern Oklahoma. A small number still reside in Florida.

In 1906, the Dawes Commission, acting pursuant to Congressional authority, created two authoritative membership rolls for the Seminole Nation (the "Dawes Rolls"). The Estelusti Seminoles were enrolled on what is sometimes referred to as the "Freedmen Roll." Non-Estelusti Seminoles were enrolled on the "Seminole Blood Roll." Because the Seminole Nation is matrilineal, if an individual's mother was a Freedman and his father was Indian by blood, that individual was enrolled in the Freedmen Roll. The Dawes Rolls are still used today to determine the members of the Seminole Nation. Anyone who can trace his or her ancestry to the Dawes Rolls is deemed to be a member of the Seminole Nation. Each member of the Dosar Barkus and Bruner Bands is a member of the Seminole Nation, and those Bands are made up exclusively of individuals descended from persons enrolled on the Freedmen Roll.

Notwithstanding the separate classification of the Estelusti Seminoles by the Dawes Commission, a treaty entered into by the United States and the Seminole Nation in 1866 (the "1866 Treaty"), and in effect at the time the Dawes Rolls were created, contains the following provision:

> [I]nasmuch as there are among the Seminoles many persons of African descent and blood. who have no interest or property in the soil. and no recognized civil rights, it is stipulated that hereafter these persons and their descendants; and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally bindings upon all persons of

> whatever race or color, who may be adopted as citizens or members of said tribe.

Treaty With the Seminole, Mar. 21. 1866, U.S.-Seminole Nat., 14 Stat. 755, 1866 WL 4729, *2.

In 1950 and 1951, the Tribe and the Seminoles still residing in Florida filed separate claims with the Indian Claims Commission seeking compensation for tribal lands in Florida ceded to the United States in 1823. Twenty-six years later, the Indian Claims Commission ruled in favor of the Seminoles and awarded a $16 million judgment to "'the Seminole Nation as it existed in Florida on September 18, 1823.'" District Court Order at 5 (quoting *Seminole Nation of Fla. & Seminole Nation of Okla. v. United States*, 38 Ind. Cl. Comm- 91 (Dockets 73 & 151)). With interest, the judgment funds totaled approximately $56 million (the "Judgment Fund Award").

In 1990, Congress passed an Act setting forth criteria for the use and distribution of the Judgment Fund Award (the "Distribution Act"). *See Indian Claims: Distribution of Funds to Seminole Indians*, Pub. L. No. 101-277, 104 Stat. 143 (1990). Although a report prepared by the BIA had recommended excluding the Freedmen from participating in the Judgment Fund Award, the Distribution Act specifically allocated approximately seventy-five percent of the Judgment Fund Award to the "Seminole Nation of Oklahoma." See id., § 2(a)(1), 104 Stat. at 143. The Distribution Act authorized the Tribe to prepare a distribution plan for the portion of the Judgment Fund Award allocated to it. See id., § 3(a), 104 Stat. at 143. The Seminole Judgment Fund Committee, a tribal legislative body established by the Seminole Nation General Council, prepared the distribution plan ("the Usage Plan"). which was narrowly approved by the Seminole Nation General Council. The Usage Plan was submitted to Congress and became effective on May 15, 1991. See Plan

for the Use of the Seminole Nation of Okla. Indian Judgment Funds in Docket Nos. 73 & 151 Before the Indian Claims Comm'n. 56 Fed. Reg. 32480, 32480 (1991).

After Congress accepted the Usage Plan, the Seminole Nation General Council established programs to be funded by the Judgment Fund Award (the "Judgment Fund Programs"). Tribal resolutions authorizing each Judgment Fund Program contain eligibility (requirements for participation. By way of example, the School Clothing Program contains the following eligibility requirement (the "Eligibility Requirement"), which must be met by all persons before they and allowed to participate in that program: "Applicant must be an enrolled member of the Seminole Nation of Oklahoma who has been determined to have descended from a member of the Seminole Nation as it existed in Florida on September 18, 1823."[2] Because the Estelusti Seminoles were not expressly recognized as members of the Seminole Nation until the 1866 Treaty, the effect of the Eligibility Requirement is to exclude the Estelusti Seminoles from participating in any Judgment Fund Program that conditions participation on meeting the Eligibility Requirement. The BIA, as trustee of the Judgment Fund Award, has disbursed millions of dollars to be expended on Judgment Fund Programs in which the Estelusti

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[2] The Usage Plan does not contain a specific eligibility requirement but provides, in pertinent part; "The principal, interest and investment income accrued shall be available for use by the tribal governing body on a budgetary basis for programs and services established in accordance with priorities determined by the tribal governing body in program areas which may include. but are not limited to, Health, education, social services, elderly, housing, general community improvement, economic and business development, expansion and preservation of the tribal land base, and tribal government support and development." Plan for the Use of the Seminole Nation of Okla. Indian Judgment Funds in Docket Nos. 73 and 151 Before the Indian Claims Comm'n, 56 Fed. Reg. 32480, 32480 (1991).

Seminoles are precluded from participating because of the Eligibility Requirement.

B. *Certificates of Degree of Indian Blood*

Certificates of Degree of Indian Blood ("CDIBs") are issued by the BIA and are the BIA's certification that an individual possesses a specific quantum of Indian blood. A CDIB entities the holder to participate in some government assistance programs. Additionally, the Tribe will accept a CDIB card as proof that an applicant seeking to participate in a Judgment Fund Program is descended from a member of the Tribe as fit existed in 1823 and, therefore, meets the Eligibility Requirement.

C. *Plaintiffs' Claims*

Plaintiff, Sylvia Davis, filed an application with the Tribe on behalf of her minor son seeking to participate in one of the Judgment Fund Programs. The Tribe denied Ms. Davis' application, stating she had not provided a copy of her son's CDIB card. She had thus failed to prove her son was descended from a member of the Seminole Nation as it existed in Florida on September 18, 1823. Plaintiffs argue the Tribe's authority to exclude the Estelusti Seminoles from Judgment Fund Programs is circumscribed by section 4 of the Distribution Act, which provides that:

> Any plan for the use and distribution of the funds allocated to the Seminole Nation of Oklahoma shall provide that not less than 80 per centum thereof shall be set aside and programmed to serve common tribal needs, educational requirements and such other purposes as the circumstances of the Seminole Nation of Oklahoma may determine.

Distribution Act, § 4(a), 104 Stat. at 144. Plaintiffs contend the use of the Judgment Fund Award to fund Judgment Fund

Programs from which Estelusti Seminoles are excluded does not "serve common tribal needs." Plaintiffs claim Defendants, as trustees of the Judgment Fund Award, are violating the Distribution Act when they disburse monies to the Tribe to fund Judgment Fund Programs that condition participation on meeting the Eligibility Requirement.

In addition to their Judgment Fund Award claim, Plaintiffs argue the BIA is violating its own policy by refusing to issue CDIBs to Estelusti Seminoles. Plaintiffs claim the BIA has a written policy expressly recognizing that the Estelusti Seminoles are entitled to receive CDIB cards.

Plaintiffs sought injunctive and declaratory relief on both their Judgment Fund Award claim and their CDIB claim. The district court dismissed Plaintiffs' complaint for failure to join an indispensable party. The dispositive language in the order of dismissal is brief:

> The Court has carefully considered the parties' arguments. Having done so, the Court is satisfied that the complaint must be dismissed. The Court agrees with defendants, for the reasons stated in defendants' June 27, 1997 reply brief, that under Fletcher v. U.S., 116 F.3d 1315 (10th Cir 1997). reh'g en banc denied, (August 18, 1997), the Seminole Nation of Oklahoma is an indispensable party that cannot be joined on account of sovereign immunity. Dismissal of the complaint is therefore appropriate and necessary.

II. DISCUSSION

A. *Standard of Review*

The question of whether an absent party is necessary and/or indispensable is resolved by applying Rule 19 of the

Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 19. This court reviews Rule 19 determinations under an abuse of discretion standard.[3] *See Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407. 1410-11 (10th Cir. 1996): Nov ''a Tribe of Indians v. New Mexico, 809 F.2d 1455. 1471 (10th Cir i 1987). Underlying legal conclusions supporting Rule 19 determinations, however, are reviewed *de novo*. *See Hellebust v. Brownback*, 42 F.2d 1331. 1335 (10th Cir. 1994) (reviewing *de novo* a district court's legal determination made in conjunction with its Rule 19(a) analysis); *accord Washington v. Daley*, 73 F.3d 1158. 1165 (9th Cir. 1999) ("We review dismissals pursuant to Rule 19 for an abuse of discretion. We review the district court's legal determinations de novo." (citation omitted)). This court first reviews a district court's underlying determination that the absent party was necessary to the suit. When, as in this case, the impossibility of joining the absent party is undisputed, this court then reviews the district court's determination of whether in equity and good conscience the lawsuit can proceed in the absence of the necessary party.

Relying on this court's Opinion in Fletcher v. United States, the district court held the Tribe was an indispensable party that could not be joined on account of sovereign immunity. See 116 F.3d 1315 (10th Cir 1997). To the extent the district court's ruling was based on conclusions of law,

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[3] In *Rishell v. Jane Phillips Episcopal Memorial Medical Center*, this court articulated an abuse of discretion standard of review for indispensability decisions and then proceeded to analyze both the district court's Rule 19(a) necessary party determination and its Rule 19(b) indispensability determination under that standard. *See* 94 F.3d 1407, 1410-12 (10th Cir. 1996). We, therefore, construe that panel's statement as an affirmation that the abuse of discretion standard of review applies to both the Rule 19(a) necessary party analysis and the Rule 19(b) indispensable party analysis. *See id.; see also Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1293-94 (10th Cir. 1994) (reviewing a Rule 19(a) issue for abuse of discretion).

we review those legal conclusions de novo. "A district court by definition abuses its discretion when it makes an error of law," Koon v. United States, 518 U.S. 81, 100 (1996).

B. *Plaintiffs' Judgment Fund Claim*

1. *Rule 19(a) - Necessary Party*

When applying Rule 19, a district court must first determine whether the absent party is necessary to the lawsuit and, if so, whether joinder of the absent party is feasible. *See* Fed. R. Civ. P. 19(a). An absent party is necessary to a suit if,

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Id.

Defendants bear the burden of demonstrating that the Tribe has an interest relating to Plaintiffs' Judgment Fund Award claim and that the Tribe's ability to protect that interest will be impaired or impeded by the disposition of the suit in its absence. *See Rishell*, 94 F.3d at 1411. Defendants argue the Tribe has an interest in its laws, ordinances and procedures and that the disposition of the suit in its absence would impair or impede the Tribe's ability to protect this interest, inasmuch as Plaintiffs are effectively seeking to

invalidate or amend Tribal ordinances creating Judgment Fund Programs.

Plaintiffs argue the Tribe's interest must be a "legally protected interest." *See Citizen Band Potawaromi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1294 (10th Cir. 1994) (using the term "legally protected interest" in the context of a necessary party analysis). Plaintiffs contend the Tribe has a legally protected interest only in "drawing down on Judgment Fund proceeds to be expended on 'common tribal needs.'"[4] Plaintiffs argue, however, that any right the Tribe had to use the Judgment Fund Award to the exclusion of the Estelusti Seminoles has been divested by treaty and act of Congress.[5] Plaintiffs, therefore, claim the Tribe is not a necessary party because it has no "legally protected interest"

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[4]Plaintiffs concede the Tribe has "legally protected interests" relating to the Judgment Fund Award but argue that these interests would not be impaired or impeded by the outcome of this lawsuit. Plaintiffs offer the following examples of the Tribe's legally protected interests: (1) the right to receive accrued interest on the Judgment Fund Award; (2) the right to have the Judgment Fund Award invested on its behalf; and (3) the right to draw down Judgment Fund Award proceeds to fund programs that serve common tribal needs.

[5] Plaintiffs argue the Tribe does not have unfettered discretion to determine eligibility for Judgment Find Programs because Congress mandated that the Judgment Fund Award be used "to serve common tribal needs." Indian Claims: Distribution of Funds to Seminole Indians, Pub. L. No. 101-277, § 4(a), 104 Stat. 143, 144 (1990). Plaintiff, however, only partially quote the applicable language from section 4(a) of the Distribution Act. The remainder of the language is equally important. That section reads in full as follows:

> (a) Any plan for the use and distribution of the funds allocated to the Seminole Nation of Oklahoma shall provide that not less than 80 per centum thereof shall be set aside and programmed to serve *common tribal needs, educational requirements, and such other purposes as the circumstances of the Seminole Nation of Oklahoma may determine*. Id. (emphasis added).

in the subject matter of the lawsuit, i.e., the monies used to fund Judgment Fund Programs that condition participation on satisfying the Eligibility Requirement. Plaintiffs misinterpret Rule 19(a).

Plaintiffs' narrow interpretation of the term "legally protected interest" inappropriately presupposes Plaintiffs' success on the merits. Under the interpretation advanced by Plaintiffs, the Tribe would have no legally protected interest in the monies used to fund Judgment Fund Programs that exclude the Estelusti Seminoles only if Plaintiffs prevail on the merits. Consequently, if this a court adopted Plaintiffs' interpretation of the term "legally protected interest," the district court would be required to determine the merits of Plaintiffs' Judgment Fund Award claim before ruling on Defendants' motion to dismiss. Such an approach is untenable because it would render the Rule 19 analysis an adjudication on the merits. The term "legally protected interest" thus cannot mean what Plaintiffs would like it to mean.

Rule 19, by its plain language, does not require the absent party to actually possess an interest; it only requires the movant to show that the absent party "*claims on interest* relating to the subject of the action." Fed. R. Civ. P. 19(a)(2) (emphasis added). The Court of Appeals for the Ninth Circuit, addressing the issue currently before this court, concluded the term "legally protected interest" can be construed to exclude only those *claimed* interests that are "patently frivolous." *See Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992).

The district court's order does not specify the Tribal interest which will be impaired or impeded by Plaintiffs'

Judgment Fund Award claim.[6] The record demonstrates, however, that the Tribe has developed, enacted, and sought approval of programs that are or will be financed by the Judgment Fund Award. The Tribe has determined the eligibility criteria for participation in such programs and has adopted ordinances containing the Eligibility Requirement. The Estelusti Seminoles are effectively prohibited from participating in Judgment Fund Programs because of the Eligibility Requirement. A ruling on the merits in favor of Plaintiffs on their Judgment Fund Award claim will have the practical effect of modifying the Tribal ordinances containing the Eligibility Requirement. Unless the Tribe is a party to the lawsuit, it has no ability to protect its claimed interest in determining eligibility requirements.

The Tribe's claimed interest in determining eligibility requirements and adopting ordinances embodying those requirements is neither fabricated nor frivolous. The disposition of Plaintiffs' Judgment Fund Award claim in the Tribe's absence will impair or impede the Tribe's ability to protect its claimed interest.[7] Consequently. we hold the

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[6] The district court's order does not expressly discuss Rule 19(a). The district court did, however, conclude the Tribe is an indispensable party. The question of whether an absent party is necessary must be answered in the affirmative before the court can determine whether the absent party is indispensable. We therefore construe the district court's ruling as including a prefatory determination that the Tribe is a necessary party whose joinder is not feasible.

[7] Plaintiffs argue in the alternative that the Tribe cannot be a necessary party because it lacks standing. Citing *Kickapoo Tribe of Oklahoma v, Lujan*, Plaintiffs argue the Tribe could not have standing to intervene in the lawsuit because the interests of the Estelusti Seminoles differ from the interests of the other members of the Tribe. See 728 F. Supp. 791, 795 (D.D.C. 1990) (holding sovereign tribe must be acting on behalf of all'its members to have standing under the doctrine of parens patriae). Assuming, without deciding, that standing is relevant to the necessary-party analysis, Plaintiffs' argument is misplaced. The Tribe's claimed interest involves Tribal laws and ordinances. Accordingly, the

(*continued on next page*)

district court did not abuse its discretion when it held the Tribe is a necessary party whose joinder is not feasible.[8]

2. *Rule 19(b) - Indispensable Party*

If an absent party is necessary but cannot be joined, the district court must then ascertain "whether in equity and good conscience the action should proceed among the parties before it or should be dismissed." Fed, R. Civ. P. 19(b). If the district court concludes the action cannot proceed "in equity and good conscience," it must deem the absent party indispensable and dismiss the suit. *See id.: see also Provident Tradesmens Bank & Trust Co.*, 390 U.S. 102, 119 (1968).

Rule 19(b) enumerates four factors which must be weighed by the district court when determining whether in equity and good conscience a suit can proceed in the absence of a necessary party:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate;

(*continued from previous page*)
Tribe, as a sovereign entity, would have standing to intervene in its capacity as a sovereign, not on behalf of its members in its capacity as parens patriae.

[8] Plaintiffs do not argue the Tribe's sovereign immunity has been waived by the Tribe or abrogated by Congress. *See, e.g., Kiowa Tribe of Oklahoma v. Manufacturing Technologies. Inc.*, 118 S.Ct. 1700, 1702 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Consequently, that issue is not before this court.

> fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. Rule 19(b).

In their appellate brief, Defendants argue that we need not weigh the Rule 19(b) factors at all, quoting a comment made by this court that "there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Enterprise Management Consultants, Inc. v. United States ex. rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (quotations omitted); *see also Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765. 777 nA3 (D.C. Cir. 1986) (cited in *Enterprise Management*). Defendants, however, read that comment far too categorically. Neither this court in *Enterprise Management* nor the D.C. Circuit in *Wichita and Affiliated Tribes* held that immunity is so compelling by itself as to eliminate the need to weigh the four Rule 19(b) factors.[9] The comments to that effect were dicta because the Rule 19(b) factors were specifically analyzed in both opinions. *See Enterprise Management*, 883 F.2d at 893-94; *Wichita & Affiliated Tribes*, 788 F.2d at 774-78. While the comment does reflect the strong policy that has favored dismissal when a court cannot join a tribe because of sovereign immunity, they do not abrogate the application of Rule 19(b), whose factors this court has applied to Indian tribes in several cases.

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[9] Justice Harlan refereed in passing to the possibility of interests "compelling by themselves" in his influential opinion interpreting the newly amended Rule 19. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968). His opinion did not suggest, however, that tribal sovereign immunity is such an interest, and the Court has never identified any interest that compels dismissal without consideration of all the Rule 19(b) factors.

See, e.g., Lear Petroleum Corp. v. Wilson, 730 F.2d 1363, 1364-65 (10th Cir. 1984); *Manygoats v. Kleppe*, 558 F.2d 556, 558-59 (10th'Cir. 1977); *Tewa Tesuque v. Morton*, 498 F.2d 240, 242-43 (10th Cir. 1974).[10] Additionally, the Supreme Court's recent statement that the judicial concept of tribal sovereign immunity developed "almost by accident" and the Court's admonition that, at least in the commercial context, the doctrine should be curtailed by Congress, casts doubt on any past notion that tribal sovereign immunity could be an interest compelling in itself for purposes of Rule 19(b). *See Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 118 S.Ct. 1700, 1703-04 (1998) (tracing the development of the judicial doctrine of tribal sovereign immunity).

In concluding the Tribe is indispensable, the district court referred with approval to Defendants' argument in their brief. In that district court brief, Defendants cited this court's opinion in *Fletcher v. United States* for the proposition that federal courts do not have jurisdiction to hear cases in which tribal interests are involved and the affected tribe is immune from suit and thus cannot be joined. See 116 F.3d at 1333 n.36. In *Fletcher*, this court briefly discussed the indispensability of a tribal council although the issue was not directly presented in the case.[11] *See id.* We briefly explained

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[10] In *Jicarilla Apache Tribe v. Hodel*, this court did dismiss a suit to modify a lease without analyzing the Rule 19(b) factors, on the ground that the Indian-tribe lessor was indispensable. *See* 821 F.2d 537, 540 & n.5 (10th Cir. 1987). This court invoked an oft-quoted Ninth Circuit opinion that suggests a rule that a party to a contract is per se indispensable to litigation affecting it. *See id.* at 540 (citing *Lomayaktewo v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975)). Defendants in this case, however, do not suggest Plaintiffs are parties to any contract potentially affected by this suit.

[11] The tribal council was named defendant in *Fletcher*, not an absent party. *See Fletcher v. United States*, 116 F.3d 1315, 1319 (10th Cir. 1997). The suit had challenged the tribe's definition of its franchise

(*continued on next page*)

in a footnote that the tribal council was indispensable, noting that "[w]e have dismissed cases under Rule 19(b) when a tribe cannot be joined . . . on account of sovereign immunity," *Id.* This court neither said nor implied that cases *must* be dismissed whenever a tribe's sovereign immunity prevents it from being joined. The brevity of the passage noting the tribal council's indispensability reflects the unusual and extreme facts of *Fletcher,* a case in which the plaintiffs challenged not just an interest of a tribe, but the very existence of its government. The footnote in *Fletcher* did not establish a new rule of *per se* indispensability. *Cf. Provident Tradesmens*, 390 U.S. at 118 ("Whether a person is 'indispensable,' that is, whether a particular' lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation."); *Sokaogon Chippewa Community v, Wisconsin, Oneida County*, 879 F.2d 300, 304 (7th Cir. 1989) ("The nature of the Rule 19(b) inquiry -- a weighing of intangibles -- limits the force of precedent and casts doubt on generalizations . . . ."). Both the Defendants and the district court, therefore, misinterpret *Fletcher.*

Because the district court erroneously interpreted Fletcher to mandate the conclusion that the Tribe was an indispensable party, that court necessarily abused its discretion when it dismissed Plaintiffs' Judgment Fund claim on that ground. *See Cooler & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("[A] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . .").

(*continued from previous page*)
and form of government; the remedy granted had abolished the tribal council and existing tribal government. *See id.* at 1318-20.

Although this court could affirm the district court's ruling for any reason supported by the record, the procedural posture of this case precludes such a disposition. *See United States v. Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994) ("We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law . . . ." (quotation omitted)). Because the district court relied solely on Fletcher in concluding the Tribe is indispensable, there is a dearth of factual findings on the issue of whether the suit can proceed in equity and good conscience in the absence of the Tribe. The district court's memorandum order neither states a set of facts relevant to the indispensability analysis nor weighs the factors argued by the parties. This court should not and thus will not perform the fact-finding function reserved for the district courts. *See Sabol v. Snyder*, 524 F.2d 1009, 1011 (10th Cir. 1475) ("It is obviously not the function of the appellate court to try the facts or substitute for the trial court in the determination of factual issues"). Without factual findings this court cannot determine whether an analysis of the four Rule 19(b) factors compels dismissal as a matter of law. *See Wright v. First Nat'l Bank of Altus, Oklahoma*, 483 F.2d 73, 75 (10th Cir. 1973) (remanding a Rule 19 determination for fact finding). Accordingly, this court declines to undertake the Rule 19(b) analysis in the first instance and remands to the district court to conduct an analysis of all the factors articulated in Rule 19(b) and make a reviewable determination as to whether the Tribe is an indispensable party with respect to Plaintiffs' Judgment Fund Award claim.

C. *CDIB Claim*

Implicit in the district court's disposition of this case is a ruling that the Tribe is an indispensable party with respect to Plaintiff's CDIB claim. Defendants, however, never argued before the district court that the Tribe was an indispensable party with respect to that claim. The portion of

Defendants' brief to the district court addressing the Rule 19 issues begins as follows: "*With respect to the allegations concerning denial of Judgment Fund benefits*, the plaintiffs have failed to join an indispensable party, . . . the Seminole Nation of Oklahoma." Appellant's Appendix at 22-27 (emphasis added).

Defendants bear the burden of demonstrating the Tribe has an interest in Plaintiffs' CDIB claim and that the Tribe's ability to protect that interest will be impaired or impeded if the suit proceeds in the Tribe's absence. *See Rishell*, 94 F.3d at 1411. The district court's order does not identify the Tribal interest implicated by Plaintiffs' CDIB claim.[12] Defendants' brief supporting their motion to dismiss does not clearly articulate any such interest or discuss whether the Tribe is indispensable to Plaintiffs' CDIB claim. The issue of whether the Tribe claims an interest affected by Plaintiffs' CDIB claim was never raised before the district court. The district court thus abused its discretion when it dismissed Plaintiffs' CDIB claim on the grounds that the Tribe was indispensable with respect to that claim.[13] *Summers v. Utah*, 927 F.2d 1165, 1168 (10th Cir. 1991) ("A

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[12] See note 6, supra.

[13] Although it was not properly before the district court, the issue of indispensability is not waivable and may be raised for the first time on appeal. *See, e.g.. Enterprise Management Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 892-93 (10th Cir. 1989). Defendants claim on appeal that the Tribe may have an interest "in ensuring that the government's procedures maintain Seminole lineage and properly assess degrees of Seminole Indian blood." Appellee's brief at 33. Tribal membership, however, is not based on the quantum of Indian blood possessed by an individual. Individuals who can trace their ancestry to the Dawes Rolls are deemed members of the Seminole Nation. The claimed interest proffered by Defendants is thus baseless. Defendants have failed to bear their burden, and the record is insufficient for this court to conclude, as a matter of law, that the Tribe has a legitimate claimed interest in Plaintiffs' CDIB claim.

clear example of an abuse of discretion is where the trial court fails even to consider either an applicable legal standard or the facts upon which the exercise of its discretionary judgment is based." (quotation omitted)).

III. CONCLUSION

We reverse the district court's order dismissing Plaintiffs' Judgment Fund Award claim and remand for further proceedings consistent with this opinion. On remand we instruct the district court to determine whether, in equity and good conscience, Plaintiffs' Judgment Fund Award claim can proceed in the absence of the Tribe. We reverse the district court's order dismissing Plaintiffs' CDIB claim.

APPENDIX D

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA DATED AND DECIDED MARCH 20, 1998 ("Davis I").

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SYLVIA DAVIS, et al.	)	
	)	
Plaintiffs,	)	No. CIV-96-1988-M
	)	March 20, 1998
v.	)	
	)	
UNITED STATES OF AMERICA; et al.	)	
	)	
	)	
Defendants.	)	

ORDER

Before the Court is defendants' "Motion to Dismiss," filed April 1, 1997 [doc. no. 21]. Plaintiffs responded in opposition May 23, 1997 [doc. no. 29]. Defendants filed a reply brief on June 27, 1997 [doc. no. 36] and supplemented their reply by way of a letter to the Court dated July 16, 1997. Plaintiffs filed a sur-reply brief on July 30, 1997 [doc. no. 40].[1] The proceedings have been stayed since September

[1] Each side has also a motion for summary judgment. Plaintiffs filed their motion for summary judgment on August 13, 1996, before the case was transferred to this district. Defendants filed their motion for summary judgment on April 1, 1997 (it was combined with their motion to dismiss). This order does not address the merits of the parties' respective motions for summary judgment. It addresses only the defendants' motion to dismiss the complaint.

19, 1997, pending resolution of defendants' motion to dismiss.

I. The Parties

The plaintiffs include the Dosar Barkus and the Bruner Bands of the Seminole Nation of Oklahoma ("Seminole Nation" or "Seminole Tribe"). Members of these Bands are members of the Seminole Tribe who are of African or mixed African/Native American ancestry. Plaintiff Sylvia Davis is the guardian and next friend of Donnell E. Davis, who is member of the Dosar Barkus Band.

The defendants include Bruce Babbitt, Secretary of the Department of the Interior; Ada Deere, the Assistant Secretary of the Interior for Indian Affairs; Roy Willis, Acting Superintendent of the Wewoka Agency of the Bureau of Indian Affairs; Jim Fields, the Acting Superintendent of the Muskogee Area Office of the Bureau of Indian Affairs; and the United States, custodian and trustee of all Native American communal property.

II. Introduction

In this lawsuit, plaintiffs allege they have been illegally excluded from receiving two categories of benefits that other members of the Seminole Tribe receive: (1) participation in the distribution of a $56 million judgment awarded to the Seminole Tribe in 1976, arising out of a claim filed by the Seminole Tribe against the United States for tribal lands taken in 1823 (the "Judgment Fund Award"); and (2) eligibility for Certificate of Degree of Indian Blood cards, which entitle the possessor to a broad range of benefits ("CDIB cards").

Plaintiffs request that the Court order the United States to order the Seminole Tribe to let the Black Seminoles

participate in the Judgment Fund Award, and further request that the Court order the United States to deem the Black Seminoles eligible for CDIB cards.

III. Historical Background[2]

A. Black Seminoles

The Black Seminoles are descendants of African slaves who escaped from Southern and Caribbean slave masters in the 18th and 19th centuries, fled to the then-foreign territory of present-day Florida, and became assimilated with the Native Americans then inhabiting that area.

The largest number of Native Americans in the area were the Creeks from Georgia. Others came from the Miccosukee, Tamassee, Hitchiti, Apalachicola and Yuchi tribes.

Some of these slaves lived, free, and some lived nominally as slaves of the Native Americans. They lived in their own villages, tilled their own fields, went into business selling goods, owned their homes, carried guns, and dressed in the fashion of other Native Americans. They intermarried with, worked with and fought alongside the Native Americans. They were warriors, interpreters, negotiators and spies for the Native Americans.

In the 18th century, this diverse group of Native American and African people, speaking several Native American and African languages, became known as

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[2] This historical background is taken from plaintiffs' complaint and, in part, from the introductory statements in defendants' opening brief.

"Seminoles." The word "Seminole" was derived from the Spanish word "cimerrones," meaning "wild," "runaway" or "outcast." The blacks among the Seminoles became known in the Seminole tongue as "Estelusti," meaning Black Seminoles.

The Seminoles are unique among Indian Tribes in that they were not aboriginal. Rather, they are an entirely post-European phenomenon. The Seminoles were comprised of various separatists, secessionists and runaways from a variety of ethnic, political and linguistic Native American and African groups.

Spain encouraged these runaways to settle in the area after disease wiped out a large portion of the native inhabitants. Spain viewed the Seminoles' settlement in the area as a deterrent to the expansion of the American colonies southward.

B. The 1823 Treaty

Florida formally became a United States territory in 1821. Two years later, in the 1823 Camp Moultrie Treaty, Seminole lands in Florida were ceded to the United States.

C. Trail of Tears

Thereafter, the Seminoles, including the Black Seminoles, were forcibly removed from Florida to what is present-day eastern Oklahoma, in what has come to be known as the Trail of Tears. This forced removal occurred over a four-year period, from 1838 through 1842.

D. Emancipation

After the Civil War ended, the Black Seminoles who had been slaves were emancipated by virtue of the Thirteenth Amendment of the United States Constitution. Thereafter, all

of the Black Seminoles (both those who had been slaves and those who had not) became known as "Freedmen."

E. The 1866 Treaty

In 1866, the Seminoles and the United States entered into the Treaty of March 21, 1866, 14 Stat. 755 (the "1866 Treaty"). The 1866 Treaty contains the following provision:

> inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color, who may be adopted as citizens or members of said tribe.

The 1866 Treaty is the genesis of the formal recognition of plaintiffs' ancestors' membership in the Seminole Nation.

F. Creation Of the Dawes Commission

In 1893, Congress created the Dawes Commission to, among other things, create authoritative membership rolls for all Native American tribes in Oklahoma, including the Seminole Nation.

G. The Dawes Rolls

In 1906, the Dawes Commission created two separate rolls for the Seminole Nation (the "Dawes Rolls"). The Black Seminoles were included in the "1906 Seminole

Freedmen Roll" while the non-black Seminoles were included in the "1906 Seminole Blood Roll." A Seminole who was half Native American and half African was counted as a Freedman, while a Seminole who was only one quarter Native American (but three quarters white) was included on the Blood Roll. No effort was made to record the percentage of Native American blood of those listed on the Freedmen Roll, though historians agree that many of those listed on the Freedmen Roll had mixed Native American ancestry.

The Dawes Rolls represent the Seminole Nation's and the federal government's official benchmark for determination of membership in the Seminole Nation. An individual who can trace his or her ancestry to the Dawes Rolls is deemed to be a member of the Seminole Nation.

H. The 1950 and 1951 Claims

In 1950 and 1951, the Seminole Nation and the Florida Seminoles filed separate claims with the Indian Claims Commission, seeking compensation for tribal lands in Florida ceded to the United States in 1823.

I. The 1976 Judgment Fund Award

On April 27, 1976, the Indian Claims Commission ruled in favor of the Seminoles and awarded $16 million plus interest to the "Seminole Nation as it existed in Florida on September 18,1823." Seminole Nation of the State of Florida and Seminole Nation of Oklahoma v. United States, 38 Ind. cl. Comm. 91 (Dockets 73 and 151). The judgment funds (approximately $56 million) were appropriated by Congress in the Act of June 1, 1976, 90 Stat. 597, 629 (the "Judgment Fund Award").

J. The 1976 Distribution of Judgment Funds Act and the BIA Results of Research Report

Congress thereafter passed the Distribution of Judgment Funds Act, 25 U. S.C., 140_-1408. Pursuant to the Act, on November 26, 1976, the Bureau of Indian Affairs ("BIA") presented Congress with its recommendations concerning the fair distribution of the Judgment Fund Award. This BIA report is referred to as the "Results of Research Report."

The BIA Results of Research Report recommended that because the treaty violations which were the subject of the Seminoles' claims against the United States had occurred before the Freedmen became members of the Seminole Tribe and before the Freedmen acquired any property rights in Florida tribal land, the Freedmen must be precluded from participation in the Judgment Fund Award. The BIA Results of Research Report also recommended that the Judgment Fund Award be divided between the Seminole Nation in Oklahoma and the Florida Seminoles based on the number of Seminoles in each tribe. The Report recommended that 75% of the award should go to the Seminole Nation in Oklahoma and 25% to the Florida Seminoles. In counting the number of Seminoles in each tribe, the BIA did not count the Freedmen.

K. 1980 Creation of Seminole Judgment Fund Committee

In 1980, the Seminole Nation General Council, the tribal legislative body, established the Seminole Judgment Fund Committee. In conformity with the Indian Claims Commission's decision and the Results of Research Report's determination that the Freedmen had no legal property interest in Florida tribal land in 1823 and thus were not

entitled to share in the Judgment Fund Award, the committee was composed of the band chiefs of the 12 Indian bands only.

L. 1990 Act

On April 30, 1990, Congress passed Pub. L. 101-277, 104 Stat. 143 (the "1990 Act"), allocating the Judgment Fund Award as recommended by the BIA in its Results of Research Report. The 1990 Act also delegated the responsibility to the Seminole Nation of Oklahoma to prepare a distribution plan for its 75% share:

> A proposed plan for the use and distribution of the funds allocated to the Seminole Nation of Oklahoma under section 2 of this Act may be prepared by the governing body of the Seminole Nation of Oklahoma in consultation with the Secretary of the Interior within one hundred and eighty days of the enactment of this Act. Upon completion of such a plan, the Secretary shall submit it to Congress without delay, together with recommendations for its approval and the reasons therefor.

M. 1991 Usage Plan

The Seminole Nation General Council approved the Seminole Nation Judgment Usage Plan (the "1991 Usage Plan"). It was submitted to Congress on January 30, 1991, and became effective 60 days later, on or about March 30, 1991.

After Congress approved the 1991 Usage Plan, the Seminole Nation General Council established a number of programs to be funded by the Judgment Fund Award. The eligibility for each separate program is set out in the tribal resolutions authorizing the program. A typical example of the

reliance on the Indian Claims Commission's language concerning the compensation for lands taken in 1823, the Tribal Higher Education Assistance Program provides that to be eligible for participation:

> [t]he applicant must be an enrolled member of the Seminole Nation of Oklahoma who has been determined to have descended from a member of the Seminole Nation as it existed in Florida on September 18, 1823.

The 1990 Distribution Act and the 1991 Usage Plan control the disposition of the Judgment Fund Award.

BIA's role is to determine, prior to the release of tribal funds, whether the planned expenditures are in accordance with the 1990 Act and the 1991 Usage Plan. The BIA determines whether adequate funds are available, and processes tribal requests for draw-downs from the United States Treasury.

The Seminole Nation's role is to process applications for judgment fund programs and to determine eligibility. The Seminole Nation requires a CDIB card as a prerequisite to participation in the Judgment Fund Award.

N. CDIB Cards

A CDIB card is the BIA's certification that an individual possesses a specific quantum of Indian Blood. The BIA does not rely on whether the applicant is a member of an Indian tribe. Rather, with respect to the Seminole Nation, any person who can trace his or her ancestry to a Seminole Indian listed on the Dawes Rolls is entitled to receive a CDIB card on application.

O. Administrative Proceedings Prior to the Filing of this Lawsuit

On September 22, 1995, counsel for the plaintiffs wrote to James Fields, Superintendent of the Wewoka Agency, BIA, alleging that Freedmen band members were being denied CDIB cards in violation of BIA policy. Fields responded October 4, 1995, stating:

> [t]he Certificate of Degree of Indian Blood makes or infers no mention of Tribal Membership. The [BIA's] policy states that my responsibility is to certify [someone's] Indian blood when acceptable proof of relationship to an individual enrolled on specific rolls of particular tribes or to a person who has received a valid Certificate of Degree of Indian Blood. For the Seminole Nation, this is the index and final rolls of citizens and Freedmen approved by Act of Congress on June 21, 1906.
>
> The final rolls of the Freedmen were mentioned [in the BIA policy statement] because there are persons listed on the Freedmen rolls who were part Indian. As you know; the Seminole Nation follows maternal lineage, for example, if the person's mother was a freedman and the father was Indian by blood, the person was enrolled in the freedmen roll. This person was still part Indian and he/she and his/her descendants would be eligible to receive a Certificate of Degree of Indian Blood. In fact, this has happened and is happening; Certificates of Degree of Indian Blood were issued and they

> have received benefits from judgment fund programs.

Superintendent's Decision of October 4, 1995, para. 2-3.

Plaintiffs appealed the Superintendent's decision. By letter dated September 11, 1996, the decision was affirmed.:

> the Superintendent's decision essentially answers the academic question of whether CDIB cards will be issued to applicants who have not presented proof of Indian Blood.
>
> A CDFB card is a certification by a BIA Agency Superintendent or a Field Representative that an individual possesses a specific quantum of Indian blood. When determining whether an individual CDIB applicant is entitled to receive a CDIB, the BIA does not rely upon whether the applicant is a member of an Indian Tribe. There are also members of Indian Tribes who are not of Indian blood. The burden of proof regarding the issuance of a CDIB rests upon the individual applicant to establish lineage from Indian ancestor. When anyone, including a Freedman Band member applies for a CDIB card without providing acceptable documentation of descendency [from] a Seminole Indian by blood, that applicant will not be issued a CDIB card.
>
> The BIA has issued, and will continue to issue, CDIB cards to members of the Freedman bands and others who have provided evidence of descendency from a member shown on the Dawes Commission

enrollment cards as possessing Seminole blood.

Decision of September __, 1996.

On October 15, 1996, plaintiffs appealed this decision to the Interior Board of Indian Appeals in Arlington, Virginia, where it remains pending and is being heard by an administrative law judge.[3]

IV. Discussion

The defendants have argued the complaint must be dismissed on a number of grounds: lack of standing, failure to exhaust administrative remedies, failure to join an indispensable party, raising an intra-tribal dispute not justiciable by a federal court, failure to state, a claim and lack of subject matter jurisdiction. Each side has filed two briefs thoroughly addressing these grounds.

The Court has carefully considered the parties' arguments. Having done so, the Court is satisfied that the complaint must be dismissed. The Court agrees with defendants, for the reasons stated in defendants' June 27, 1997 reply brief, that under Fletcher v. U. S., 116 F.3d 1315 (10th Cir. 1997), reh'g en banc denied (Aug. 18, 1997), the Seminole Nation of Oklahoma is an indispensable party that cannot be joined on account of sovereign immunity.

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[3] In their 1997 briefs, the parties stated that this appeal was still pending. They have not advised the Court of any change in the status of the appeal.

Dismissal of the complaint is therefore appropriate and necessary.[4]

V. CONCLUSION

A. Defendants' Motion to Dismiss, filed April 1, 1997 [doc. 21-1], is GRANTED and the complaint is dismissed in its entirety.

B. Defendants' alternative motion for summary judgment, filed April 1, 1997 [doc. 21-2], is MOOT in view of the dismissal of the complaint.

C. Plaintiffs' motion for summary judgment, filed August 13, 1996 [doc. no. 0-1], is MOOT in view of the dismissal of the complaint.

IT IS SO ORDERED this 20th day of March, 1998.

/s/
VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE

ENTERED ON JUDGMENT DOCKET ON 3/20/98

[4] The Court's dismissal of the complaint pursuant to Fletcher should not be construe1 as a determination of any of the other grounds for dismissal raised by defendants. The Court expressly does not address, in this order, defendants' other grounds for dismissal.

APPENDIX E

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC DATED DECEMBER 16, 2003

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SYLVIA DAVIS, as guardian and next friend for Donnell E. Davis; DOSAR-BARKUS BAND OF THE SEMINOLE NATION OF OKLAHOMA; BRUNER BAND OF THE SEMINOLE NATION OF OKLAHOMA,

Plaintiffs-Appellants,

- against -

UNITED STATES OF AMERICA; DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; GALE NORTON, Secretary of the Interior, her agents, employees and successors; NEAL A. MCCALEB, Assistant Secretary of the Interior for Indian Affairs, his agents, employees and successors; GLORIA SPYBUCK, Superintendent, Bureau of Indian Affairs, Wewoka Agency; JEANETTE HANNA, Regional Director, Bureau of Indian Affairs, Eastern Oklahoma Regional Office, her agents, employees and successors,

Defendants-Appellees.

No. 02-6198
Dec. 16, 2003

ORDER
Filed December 16, 2003

Before **MURPHY**, **BALDOCK** and **HARTZ**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

PATRICK FISHER, Clerk of Court

by: /s/
Deputy Clerk

APPENDIX F

TREATY WITH THE SEMINOLE, Mar. 21, 1866, U.S. – Seminole Nation of Indians, Art. II, 14 Stat. 755, 756.

March 21, 1866.

* * *

Article 2

The Seminole Nation covenant that henceforth in said nation slavery shall not exist, nor involuntary servitude, except for and in punishment of crime, whereof the offending party shall first have been duly convicted in accordance with law, applicable to all the members of said nation. And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color, who may be adopted as citizens or members of said tribe.

* * *

APPENDIX G

STATUTES

Indian Claims: Distribution of Funds to Seminole Indians

PL 101-277 (S 1096)
April 30, 1990

* * *

SEC. 2. (a) The funds appropriated with respect to the judgments awarded to the Seminole Indians in dockets 73 and 151 of the Indian Claims Commission (less attorney fees and litigation expenses), including all interest and investment income accrued thereon, are allocated hereby as follows--

(1) 75.404 per centum of such funds are allocated to the Seminole Nation of Oklahoma;

* * *

SEC. 4. (a) Any plan for the use and distribution of the funds allocated to the Seminole Nation of Oklahoma shall provide that not less than 80 per centum thereof shall be set aside and programmed to serve common tribal needs, educational requirements, and such other purposes as the circumstances of the Seminole Nation of Oklahoma may determine.

(b) No per capita distribution may be made from the sum allocated to the Seminole Nation of Oklahoma, except that the investment income from not more than 20 per centum of the fund may be distributed per capita from time to time in the discretion of the tribal governing authority pursuant to a distribution plan approved by the Secretary. No per capita distribution shall occur pursuant to this subsection until a roll of members of the Seminole Nation of Oklahoma born on or

before and living on the date of enactment of this Act has been certified by the Secretary.

* * *

SEC. 8. (a) The funds allocated pursuant to this Act are hereby declared to be held in trust by the United States for the benefit of the Seminole Nation of Oklahoma, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, and the independent Seminole Indians of Florida respectively.

* * *

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25 U.S.C. § 122. Limitation on application of tribal funds

No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law.

Indian Tribal Judgment Funds Use or Distribution Act

25 U.S.C. § 1401. Funds appropriated in satisfaction of judgments of Indian Claims Commission or United States Court of Federal Claims

(a) Use and distribution

Notwithstanding any other law, all use or distribution of funds appropriated in satisfaction of a judgment of the Indian Claims Commission or the United States Court of Federal Claims in favor of any Indian tribe, band, group, pueblo, or community (hereinafter referred to as "Indian tribe"), together with any investment income earned thereon, after payment of attorney fees and litigation expenses, shall be made pursuant to the provisions of this chapter.

(b) Amounts remaining to be held in trust unless otherwise provided

Except as provided in sections 164 and 165 of this title, amounts which the Secretary of the Interior has remaining after execution of either a plan under this chapter, or another Act enacted heretofore or hereafter providing for the use or distribution of amounts awarded in satisfaction of a judgment in favor of an Indian tribe or tribes, together with any investment income earned thereon and after payment of attorney fees and litigation expenses, shall be held in trust by the Secretary for the tribe or tribes involved if the plan or Act does not otherwise provide for the use of such amounts.

* * *

25 U.S.C. § 1402. Plan for use or distribution of funds

(a) Preparation and submission to Congress by Secretary of the Interior; contents; copy to affected Indian tribe

Within one year after appropriation of funds to pay a judgment of the Indian Claims Commission or the United States Court of Federal Claims to any Indian tribe, the Secretary of the Interior shall prepare and submit to Congress a plan for the use and distribution of the funds. Such plan shall include identification of the present-day beneficiaries, a formula for the division of the funds among two or more beneficiary entities if such is warranted, and a proposal for the use and distribution of the funds. The Secretary shall simultaneously submit a copy of such plan to each affected tribe or group.

* * *

25 U.S.C. § 1403. Preparation of plan

(a) Prerequisites for final preparation

The Secretary shall prepare a plan which shall best serve the interests of all those entities and individuals entitled to receive funds of each Indian judgment. Prior to the final preparation of the plan, the Secretary shall--

(1) receive and consider any resolution or communication, together with any suggested use or distribution plan, which any affected Indian tribe may wish to submit to him; and

(2) hold a hearing of record, after appropriate public notice, to obtain the testimony of leaders and members of the Indian tribe which may receive any portion, or be affected by the use or distribution, of such funds, in the area in which such Indian tribe is located and at a time which shall best serve the convenience of the eligible members thereof.

(b) Guidelines

In preparing a plan for the use or distribution of the funds of each Indian judgment, the Secretary shall, among other things, be assured that--

* * *

(2) the needs and desires of any groups or individuals who are in a minority position, but who are also entitled to receive such funds, have been fully ascertained and considered;

* * *

(5) a significant portion of such funds shall be set aside and programed to serve common tribal needs, educational requirements, and such other purposes as the circumstances of the affected Indian tribe may justify, except not less than 20 per centum of such funds shall be so set aside and programed unless the Secretary determines that the particular circumstances of the pertinent Indian tribe clearly warrant otherwise: *Provided*, That in the development of such plan the Secretary shall survey past and present plans of the tribe for economic development, shall consider long range benefits which might accrue to the tribe from such plans, and shall encourage programing of funds for economic development purposes where appropriate; and

* * *

APPENDIX H

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND DECIDED SEPTEMBER 27, 2001.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE SEMINOLE NATION OF OKLAHOMA, Plaintiff, - against - GALE NORTON, *et al.*, Defendants.	Civ No. 00-2384 (CKK) Sept. 27, 2001

MEMORANDUM OPINION

This case comes before the Court on cross-motions for summary judgment. Plaintiff, the Seminole Nation of Oklahoma (hereinafter "Seminole Nation" or "Nation"), filed suit seeking review, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., of a final decision from Defendant Department of the Interior ("DOI").[1] Plaintiff asserts that the decision of the DOI, as memorialized in a

[1] Plaintiff has named as Defendants in this action the Secretary of the Department of the Interior and the Assistant Secretary of the Department of the Interior. Both of these individuals are sued in their official capacity as representatives of the Department of the Interior. In the interest of simplicity, the Court shall refer to in most instances to "Defendant DOI" or "DOI," rather than to "Defendants Secretary and Assistant Secretary of the DOI."

letter dated September 29, 2000, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. Defendants respond that the Assistant Secretary of Indian Affairs (the "Assistant Secretary") properly complied with the APA. Having considered both parties' motions, oppositions, Defendants' reply, Plaintiff's "recently discovered authority," and the filings of the Dosar-Barkus and Bruner Bands of the Seminole Nation as amici, the Court concludes that Defendants' motion shall be granted in part and denied in part, and Plaintiff's motion shall be granted in part and denied in part.

I. BACKGROUND

The Seminole Nation is a federally recognized Indian tribe. Am. Compl. ¶ 1. The Nation is located within the boundaries of Seminole County, Oklahoma. *Id.* ¶ 1. The Seminole Constitution was approved by the Nation's voters on March 8, 1969. *Id.* ¶ 10. The Nation opted not to organize under the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. § 503, and, like other Oklahoma tribes, was excluded from coverage of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 476. *Id.* ¶ 10.

The Freedmen, also known by their Seminole name, "Estelusti," constitute a significant portion of the Seminole Nation. As referenced in the September 29, 2000, letter, one of the proposed amendments to the Seminole Constitution is the removal of the Freedmen from membership in the Seminole Nation of Oklahoma. The history of the Freedmen, as recently recounted by the U.S. Court of Appeals for the Tenth Circuit, is as follows:

> Some members of the Seminole Nation are descended from escaped African slaves who resided among several Native American groups living in what is now

Florida. These Native American groups, together with the Africans living among them, became known as the Seminoles. The Africans were referred to in the Seminole tongue as "Estelusti."

In 1906, the Dawes Commission, acting pursuant to Congressional authority, created two authoritative membership rolls for the Seminole Nation (the "Dawes Rolls"). The Estelusti Seminoles were enrolled on what is sometimes referred to as the "Freedmen Roll." Non-Estelusti Seminoles were enrolled on the "Seminole Blood Roll." Because the Seminole Nation is matrilineal, if an individual's mother was a Freedman and his father was Indian by blood, that individual was enrolled in the Freedmen Roll. The Dawes Rolls are still used today to determine the members of the Seminole Nation. Anyone who can trace his or her ancestry to the Dawes Rolls is deemed to be a member of the Seminole Nation. Each member of the Dosar Barkus and Bruner Bands is a member of the Seminole Nation, and those Bands are made up exclusively of individuals descended from persons enrolled on the Freedmen Roll.

Notwithstanding the separate classification of the Estelusti Seminoles by the Dawes Commission, a treaty entered into by the United States and the Seminole Nation in 1866 (the "1866 Treaty"), and in effect at the time the Dawes Rolls were created, contains the following provision:

> [I]nasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color, who may be adopted as citizens or members of said tribe.

Treaty With the Seminole, Mar. 21, 1866, U.S.-Seminole Nat., 14 Stat. 755, 1866 WL 4729, at *2.

Davis v. United States, 192 F.3d 951, 954-55 (10th Cir. 1999).

In its original form, the Seminole Constitution includes a provision in Article XIII which states that all constitutional amendments are subject to approval by the Secretary of the Department of Interior ("DOI"). The Seminole Nation amended its constitution in 1989 and 1991. Am. Compl. at ¶ 10. The 1991 amendments purported to eliminate the Article XIII provision that requires approval from the Secretary of all constitutional amendments. *Id.* ¶ 11. Ironically, the Nation did not complete the amendment process by obtaining approval from the Secretary for this amendment. The Commissioner of the Bureau of Indian Affairs ("BIA"), acting on behalf of the Secretary, *sua sponte*

declined to approve the 1991 amendment to Article XIII. *Id.* ¶ 11. An appeal from this disapproval was taken to the Interior Board of Indian Appeals ("IBIA") which held that the Secretary has broad discretion to decide whether to approve an amendment to the Seminole Constitution which removes the Secretarial approval provision. *Id.* ¶ 11; *Seminole Nation of Oklahoma v. Acting Director, Office of Trial Service, Bureau of Indian Affairs*, 24 IBIA 209, 223 (1993). Thus, the Board affirmed the BIA's decision. Am. Comp. ¶ 11. In this regard, the Board found that the Secretary had the authority to approve or disapprove amendments to the Seminole Constitution based upon the approval provision in Article XIII of the Seminole Constitution. 24 IBIA at 223-224. The Board noted, in addition, that a federal statute requires the Secretary to approve amendments to the Seminole Constitution which concern selection of the Principal Chief. 24 IBIA at 222.

On July 1, 2000, the Seminole Nation again purported to amend its Constitution approving nine amendments to the Constitution.[2] Am. Compl. ¶ 15. Three of the amendments

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[2] Specifically, the Nation approved nine amendments to the Constitution providing for the following:

1. Creation of a new Article (Article XVII) vests the judicial power of the Seminole Nation in one Supreme Court limited to matters within the Seminole Nation of Oklahoma's territorial jurisdiction, and providing for the establishment of District Courts by the General Council. The amendment also establishes a separation of powers between the judiciary, legislative, and executive branches of the Tribe's government and adds appropriate references to the separation of powers throughout the Constitution.

2. Amendment of Article V which sets forth the Powers of the General Council to include the "power to raise revenue ... to lay and collect taxes within the territorial jurisdiction of the Seminole Nation of Oklahoma [and to] accept taxes on ownership of real and personal property of members of the Seminole Nation of Oklahoma."

(*continued on next page*)

(*continued from previous page*)

3. Amendment to Article XV extending the territorial jurisdiction of the Seminole Nation.

4. Amendment to Article III to establish term limits for the elected office of Chief and Assistant Chief to a term of four years, for no more than two consecutive terms.

5. Creation of a new Article (Article XVI) to reserve initiative and referendum powers to members of the Seminole Nation of Oklahoma. Specifically, Section 1 reserves the power to propose laws and to enact or reject the same at the polls independent of the General Council. Section 2 reserves the referendum power to approve or reject at the polls any act of the General Council. Section 3 concerns procedures for filing petitions and orders for referendum. Section 4 reserves the power to present to the General Council petitions of a general nature. Section 5 directs the General Council to make suitable provisions for carrying into effect the provisions of the new Article.

6. Amendment to Article II to require one-eighth quantum of Seminole Indian Blood to be a member of the Seminole Nation, subject to two exceptions.

7. If the sixth proposed amendment to the Constitution does not pass, Article II would be amended to change the term "Seminole citizen" to "Seminole Indian citizen by blood."

8. Amendment to Article IV, Section 3 to indicate that all council members representing Indian Bands must have at least one quarter Seminole Indian blood by removing the exception to this requirement for Freedman Council members.

9. Empowering the General Council to revise the "Judgment Fund Plan." (Note: the full text of proposal # 9 does not appear in the Administrative Record).

Admin. R., Doc. 12. It is noteworthy that in summarizing the proposed amendments, the DOI's memorandum relies upon document number fifteen (15) from the administrative record, which is a news article retrieved from the world wide web which summarizes proposed amendments. See 6-7 (citing Admin. R., Doc. 15). As this summary does not appear to accurately track the "Public Notice" published in the Seminole Producer on May 2, 2000, see Admin. R., Docs. 12 and 13, the Court has identified and numbered the proposed amendments as they

(*continued on next page*)

affect conditions for membership in the Nation. Administrative Record ("Admin. R."), Docs. 12 and 13. Unamended, Article II provides in pertinent part that "[t]he membership of [the Seminole Nation of Oklahoma] shall consist of all Seminole Citizens whose names appear on the final rolls of the Seminole Nation of Oklahoma, approved pursuant to Section 2 of the Act of April 25, 1906 (34 Stat. 137), and their descendants." Admin. R., Doc. 3 at 1.

In a letter dated July 29, 2000, the Regional Director of the BIA, on behalf of the Secretary of the DOI, advised the Nation that he would not approve the latest amendments to the Seminole Constitution because the Nation had not followed the procedure outlined for OIWA tribes. Am. Compl. ¶ 16. The Nation appealed the letter to the IBIA, which held in response that the July 29, 2000. letter was null and void.[3] *Id.* ¶ 17. Plaintiff alleges that on August 14, 2000, BIA officials verbally informed the Nation that "the payments that would normally be paid to the Tribe the following day would probably not be paid." *Id.* ¶ 18. The Nation was allegedly informed further that this action would be taken because the Nation had failed to submit the recent constitutional amendments to the BIA for approval. *Id.* ¶ 18.

On August 30, 2000, the Nation received a letter from the Assistant Secretary for Indian Affairs at the DOI. *Id.* ¶ 21. This letter reiterated the statement in the BIA's July 29, 2000, letter that the recent amendments to the Seminole

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(*continued from previous page*)
appear in the Public Notice, rather than as summarized in the news article provided at Admin R., Doc. 15, and relied upon in this action by the DOI.

[3] The grounds for the victorious appeal appear to have been that the Nation had not elected to organize under the OIWA. Am. Compl.¶ 16.

Constitution had not yet been submitted for approval. *Id.* ¶ 21. The August 30 letter provided in conclusion:

> The purpose of this letter is to request that the July 1, 2000, revisions be submitted to the Eastern Oklahoma Regional Office, within 20 days of the date of this letter, for review and recommendations to this office. Should this request not be met, the Department of the Interior will have no choice but to disapprove all[4] of the proposed revisions ...

Admin. R., Doc. 19 at 2. Viewing the DOI's action as a threat to the "health, welfare and safety" of the Nation, the Attorney General of the Seminole Nation prepared to file suit in U.S. District Court to enjoin the actions of the DOI. Am. Compl. 25-28.

Prior to filing suit, the Nation and the DOI worked out an agreement whereby the DOI would issue a "final decision" and the DOI would delay taking the action described in the August 30, 2000, letter. The DOI issued its final decision in a letter dated September 29, 2000. *Id.* ¶ 31. The letter recounts the DOI's "request that the Seminole Nation of Oklahoma submit nine recently proposed constitutional revisions to the Bureau of Indian Affairs in accordance with Article XIII, section 1 of the Seminole Constitution." Am. Compl., Ex. 1; Admin. R., Doc. 20. The letter expresses particular concern "about the revisions that purport to disenfranchise the Freedmen members of the

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[4] Despite the fact that the administrative decision before the Court consisted of the disapproval of all of the recent amendments to the Seminole Constitution, the parties focus almost exclusively upon the amendment to Article II of the Seminole Constitution concerning membership of the Freedmen in the Nation.

Seminole Nation." *Id.* The letter states that, as a result of the Nation's failure to submit the constitutional revisions, all of the purported amendments to the Seminole Constitution, including the action taken to remove the Freedmen from membership, are deemed "disapproved and invalid" and without "force and effect." *Id.* Finally, the letter advises that "for purposes of carrying out the government-to-government relationship between the United States and the Seminole Nation of Oklahoma, [the DOI] will not recognize any further resolutions or actions of the General Council without the participation of the Freedmen." *Id.* It is this final agency action, as memorialized in the DOI's September 29, 2000, letter from which the Seminole Nation seeks relief. Accordingly, on October 3, 2000, the Seminole Nation filed suit against the DOI seeking judicial review of the DOI's refusal to recognize the recent constitutional amendments.

II. STANDARD OF REVIEW

The APA empowers the Court to "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A) and (C). Although the judiciary bears the responsibility under the APA to set aside agency decisions that meet this description, *see MID Pharmaceutical, Inc. v. Drug Enforcement Admin.*, 133 F.3d 8, 16 (D.C. Cir. 1998), "[t]he scope of review under the 'arbitrary and capricious standard' is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Nonetheless, this Circuit has held that "where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, we must undo its action." *Petroleum Communications, Inc. v. F.C.C.*, 22 F.3d 1164, 1172 (D.C.

Cir. 1994) (citing *American Tel. & Tel. Co. v. F.C.C.*, 974 F.2d). Summary judgment is appropriate if the record, viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994); Fed. R. Civ. P. 56(c).

III. DISCUSSION

The roots of the concept of tribal sovereignty and self-determination reach back at least to the Constitution itself. *See e.g.*, U.S. Const. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."). In 1831, the Supreme Court noted that even before the United States entered into treaties with Indian tribes formalizing relations, these tribes were distinct organizations capable of self-government. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). Accordingly, Supreme Court jurisprudence has recognized the right to self-government as a fundamental aspect of tribal existence.[5] *See e.g., White Mountain Apache Tribe v. Bracker*, 448 5 U.S. 136, 142-45 (1980); *Wheeler v. Department of Interior*, 811 F.2d 549, 551 (10th Cir. 1987). The Supreme Court's policy of "encouraging tribal self-government ... reflects the fact that Indian tribes retain 'attributes of sovereignty over both their

[5] Respect for tribal self-government is also reflected in executive orders and various acts of Congress. See e.g., Executive Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998) ("Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government."); 25 U.S.C. § 450 *et seq.* (containing Congressional findings regarding "the obligation of the United States to respond to the strong expression of the Indian people for self-determination.")

members and their territory,' to the extent that sovereignty has not been withdrawn by federal statute or treaty." *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (quoting *United States v. Mazurie*, 419 U.S. 514, 557 (1975)) (internal citation omitted).

In situations of federal-tribal government interaction where the federal government must decide what tribal entity to recognize as the government, it must do so in harmony with the principles of tribal self-determination. *See Wheeler*, 811 F.2d at 552. The *Wheeler* court wrote that, even when determining which tribal group the federal government should recognize, "the Supreme Court has stated that '[a]mbiguities in federal law have been construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'" *Id.* (citing *Bracker*, 448 U.S. at 143-44).

Relying upon the tribe's inherent authority to regulate its own affairs to the extent that Congress, by statute or treaty, has not usurped or extinguished such inherent authority, Plaintiff attacks the DOI's disapproval of the recent amendments to the Seminole Constitution on two fronts. First, Plaintiff contends that the DOI's decision is contrary to law because the DOI does not have statutory or treaty-based authority which enables the DOI to "not recognize any future resolutions or actions of the [Seminole] General Council." 13 (quoting letter dated September 29, 2000, at 2). Second, Plaintiff argues that the DOI's decision to disapprove the amendments is not "reasoned" and thus, is arbitrary and capricious. Pl. Mem. at 18.

Specifically, the challenged final agency action in this case is that which is memorialized in the DOI's September 29, 2000, letter to Chief Haney regarding the recent amendments to the Seminole Constitution. The letter expresses "particular[] concern" with regard to the "revisions

which purport to disenfranchise the Freedmen members of the Seminole Nation." Admin. R., Doc. 20 at 1. The letter goes on to explain that the "Freedman Bands became members of the Seminole Nation" pursuant to Article II of the Treaty of March 21, 1866. *Id.* The DOI notes that the "recently proposed constitutional revisions would, among other things, remove the Freedmen from membership in violation of this Treaty and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302." *Id.* The DOI explains further that the Nation failed to submit the proposed amendments to the DOI for approval and indicated an intent not to do so. *Id.* As a result, the DOI "deemed [the amendments] disapproved and invalid" and "decline[d] to afford them any force or effect." *Id.* at 2. The immediate effect of this disapproval, explains the DOI, is a refusal to recognize any future resolutions or actions of the nation's General Council without the participation of the Freedmen, as the body is "no longer lawfully constituted." *Id.*

In response, the Nation argues that the September 29, 2000, letter exceeded the statutory authority of the DOI. In this regard, the Nation focuses largely upon the preliminary warnings in the August 30, 2000, letter from the DOI which preceded the final agency action memorialized in the September 29, 2000, letter. The August 30, 2000, letter to the Nation sets forth six sources of legal authority as a basis for a "request" contained in the August 30 letter that the Nation submit the amendments to the DOI within twenty days. Admin. R., Doc. 19. The August 30 letter further warn that if the Nation fails to comply with the DOI's request, the amendments will be deemed disapproved. The Nation's focus upon the August 30 letter is somewhat misplaced, as the letter is merely the precursor to the final agency decision of the DOI. More significantly, the DOI does not rely on all six sources of authority cited in the August 30 letter as the basis for its authority to take the action described in the September 29, 2000 final decision letter. As the DOI concedes in its

opposition memorandum, the six sources of legal authority were primarily cited as part of the DOI's argument against exclusion of the Freedman from tribal membership and were not cited for the proposition that the DOI possesses the authority to approve and disprove tribal amendments. Accordingly, in addressing the Nation's attack upon the DOI's authority, the Court bases its analysis only on the authority relied upon by the DOI in reaching its final decision -- the bases set forth in the September 29 letter.

The September 29 letter sets forth multiple bases for the DOI's action. Initially, the DOI notes that Article XIII, Section 1 of the Seminole Constitution requires submission of proposed constitutional revisions to the BIA. Admin. R., Doc. 20. In conjunction with this assertion, DOI notes that in Seminole Nation of Oklahoma, 24 IBIA at 223, the IBIA previously considered the very question of whether DOI/BIA approval was required for amendments to the Seminole Constitution and concluded that the DOI did not abuse its discretion in refusing to approve the 1991 amendments to the Seminole Constitution. *Id.* In addition, the DOI argues that the Act of 1970, Pub. Law 91-495, 84 Stat. 1091, requires Secretarial approval of an amendment which would remove the Freedman from membership in the Seminole Nation because such removal would "change the composition of the class of voters eligible to participate in the selection of the Principal Chief." *Id.* at 2. The Court will consider these two purported bases for DOI authority in turn.

A. Article XIII of the Seminole Constitution

The DOI insists that the Article XIII of the Seminole Constitution requires that properly ratified amendments "shall be submitted to the Commissioner of Indian Affairs and shall have full force and effect from the date of his approval." Admin. R., Doc. 3 (Seminole Constitution) at 8. The Nation responds that Article XIII of the Constitution was

repealed via a 1989 referendum vote. Of course, these arguments bring the issue back to the holding of the IBIA in *Seminole Nation*. Seeming to ignore, or at least misread, the IBIA's opinion and holding, the Nation derides the DOI's view that Article XIII can only be removed with DOI approval. Pl. Opp. at 4. Contrary to the Nation's assertion, the 1993 IBIA opinion plainly endorses the DOI's view that the Nation cannot repeal Article XIII without DOI approval. Indeed, the portion of the opinion cited by the Nation in its opposition memorandum does not indicate otherwise, but instead distinguishes a constitutional requirement for Secretary approval of amendment to tribal *law* from a constitutional requirement of Secretary approval of amendment to the tribal *constitution*. *Seminole Nation*, 24 IBIA at 219 n.13. The IBIA considered and decided the issue of the 1989 referendum vote and its effect upon Article XIII of the Seminole Constitution and determined that the IBIA properly declined to approve the 1989 constitutional amendment which purported to remove the requirement of IBIA *Id.* at 226. As a result, the DOI now takes the position that Article XIII is still in effect.

Specifically, the IBIA based its holding not on any statutory authority which authorized the Secretary to approve or disapprove amendments to the Seminole Constitution, but upon the provision in Article XIII of the Seminole Constitution *Id.* at 226 ("[T]he board concludes that the decision to disapprove Amendment No. 5 [which rescinds the Secretary's approval authority] was made within the scope of the BIA's discretion under *Article XIII of the Nation's constitution*.") (emphasis added). Acknowledging the power to approve or disapprove the proposed amendment to Article XIII, the IBIA had only to determine the scope of the Secretary's discretion in exercising this approval and whether that discretion had been exercised appropriately. The IBIA concluded that it had been so exercised. *Id.*

Notwithstanding the clear decision of the IBIA, the Nation argues that the DOI's view that Article XIII is still in effect is "circular and illogical." Nation Opp. at 4. Admittedly, the Nation is in something of a "catch-22" in that it must seek approval from the DOI before rescinding the requirement that it seek such approval. However, the Nation is simply wrong in asserting that the DOI's position has been "refuted by the Supreme Court" in *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 199 (1985). *Id.* The opinion in *Kerr-McGee*, cited in the IBIA's opinion, addressed "whether Congress has enacted legislation requiring Secretarial approval of Navajo tax laws." 471 U.S. at 198. The *Kerr-McGee* Court did not, in any way, consider this issue of Secretarial approval of a constitutional amendment, nor did it consider the unusual circumstances here, where the Seminole Nation seeks to amend a constitutional provision requiring Secretarial approval of all constitutional amendments, without first obtaining Secretarial approval. *Id.* As a result, the Nation's use of the holding of *Kerr-McGee* to attack the first stated basis of DOI authority is without merit.

Although this Court is not tasked with review of the IBIA's 1993 decision in *Seminole Nation*, the Court's view of the validity of that decision necessarily impacts upon the Court's determination of whether the Secretary still possesses the authority to approve or disapprove of the Nation's constitutional amendments. Notwithstanding the well recognized maxim that one of the fundamental aspects of tribal existence is the right to self government, the *Wheeler* court recognized that "[i]f a tribe's constitutions call for the Department [of Interior] to take an active role in lawmaking, the Department *may refuse* to recognize laws that the tribal authorities have passed." *Wheeler*, 811 F.2d at 551 (emphasis added). In the instant case, Article XIII of the Seminole Constitution plainly calls for the DOI to take an "active role" in approving or disapproving amendments to the Seminole Constitution. When the Nation attempted to rescind this

portion of Article XIII, the DOI refused to approve such recission. Oddly, this Court is not in a position to now determine whether such refusal was appropriate, nonetheless, this Court must determine whether to give effect to the same.

In 1991, the Nation did not purport to revoke its federally approved Constitution and replace it with an unapproved Constitution which lacks the internal requirement for DOI approval of amendments. *Seminole Nation*, 24 IBIA at 225. To the contrary, the Nation attempted to amend its Constitution, but failed to complete the final step required for amendment to take place, *as provided by the Seminole Constitution* itself. Namely, the Nation did not obtain DOI approval of the amendment. Accordingly, the amendment process cannot be viewed as complete. Therefore, in accordance with the IBIA, this Court takes the view that the approval provision in Article XIII has not been rescinded, as the DOI never granted approval for such recission. As a result, the DOI remains bound to approve or disapprove amendments to the Seminole Constitution. Because Article XIII of the Seminole Constitution authorizes the DOI to so act, the Court need only determine whether the DOI has acted reasonably with respect to the year 2000 amendments, within the scope of its authority. Nevertheless, the Court will first address the DOI's proffered alternative basis for exercising the power to review amendments to the Seminole Constitution.

B. Act of October 22, 1970

The DOI also cites to the Act of October 22, 1970, Pub. L. 91-495, 84 Stat. 1091, as a basis for Secretarial approval or disapproval of the most recent amendments to the Seminole Constitution. Admin. R., Doc. 20. The Act was passed "to permit the members of the Five Civilized Tribes of Oklahoma to select their own principal chiefs or governors, rather than accepting such appointments by the

Secretary of the Interior." *Morris v. Watt*, 640 F.2d 404, 408 n.12 (D.C. Cir. 1981). The Act provides in pertinent part:

> That, notwithstanding any other provisions of law, the principal chiefs of the Cherokee, Choctaw, Creek, and Seminole Tribes of Oklahoma and the governor of the Chickasaw Tribe of Oklahoma shall be popularly selected by the respective tribes in accordance with procedures established by the officially recognized tribal spokesman and or governing entity. Such established procedures shall be subject to approval by the Secretary of the Interior.

Act of October 22, 1970, Pub. L. 91-495, 84 Stat. 1091; *see also Harjo v. Kleppe*, 420 F. Supp. 1110, 1139-40 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F2d 949 (D.C. Cir. 1978); 1970 U.S.C.C.A.N. 4332-35. The DOI asserts that the proposed amendments to the Seminole Constitution, which would remove the Estelusti from the tribe, will "fundamentally affect the composition of the governing body of the Seminole Nation." DOI Mem. at 18. This change in composition, argues the DOI, changes the "procedures controlling the selection of the Principal Chief of the Seminole Nation, and, thus, requires federal approval under Section 1 of the Act of October 22, 1970." *Id.*

The Seminole Nation, in its opposition, does not provide an elaborate response to the DOI's arguments with respect to the Act of October 22, 1970. Instead, the Nation chooses to focus on a statute which was cited in the DOI's August 30, 2000, letter to the Nation, but was not relied upon in the DOI's September 29, 2000, final decision, or in the DOI's memoranda. As appropriately highlighted in the DOI's reply, the DOI has not relied upon the Treaty of 1866 as a basis for its authority. Rather, the DOI cites to the Treaty as a

substantive justification for the rejection of those amendments which would remove the Freedmen from membership in the Seminole Nation. Thus, the Nation's discussion of the status of the Treaty of 1866, while relevant in the following section with regard to the proper exercise of DOI discretion, is largely irrelevant to the first issue before the Court-- whether the DOI possessed the authority to approve or disapprove the recent amendments to the Seminole Constitution.

When Plaintiff does address the 1970 Act, Plaintiff argues, in its motion for summary judgment, that the holding in *Harjo v. Kleppe* makes clear that the Act of October 22, 1970, is limited to "the narrow issue of the method of selection of the Principal Chief." Pl. Mem. at 12. Despite the accuracy of this assertion, the statement itself does not necessarily bolster Plaintiff's position. The government contends that at least some of the Nation's recent amendments to its Constitution affect voting on the Nation's General Council, and thus, the selection of the tribe's chief.

It is clear, however, at the outset that not all of the purported amendments to the Seminole Constitution approved by the Seminole voters on July 1, 2000, concern selection of the tribe's chief. As the DOI concedes, only certain of the proposed amendments even have the potential to fall within the ambit of "procedures" for the selection of the principal chief. Def. Mem. at 19. The DOI asserts that the amendment which would establish a term limit for the position of principal chief is subject to DOI approval pursuant to the Act of 1970, as it affects the procedures for the selection of the chief. *Id.* Likewise, the DOI argues that the amendments affecting the membership of the Freedmen in the Seminole Nation alter the procedures for selecting the chief. *Id.* The DOI explains that removal of the Freedmen from the Tribe "affects the universe of voters eligible to vote in tribal elections, including elections for Principal Chief."

Id. at 20. Thus, in the DOI's view, any amendment which affects the universe of potential voters can be said to affect the procedures for the selection of the principal chief.

In making this argument, the DOI invites the Court to review its interpretation of the Act of 1970 as applicable to the Seminole Nation's efforts to amend its Constitution. Ordinarily, the Court would follow the familiar two step process set forth in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), determining first if the statute at issue is ambiguous, and if so, deferring to the interpretation of the agency entrusted with the statute's administration. In these circumstances, however, the "governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). This cannon, which arises "not from ordinary exegesis, but 'from principles of equitable obligations and normative rules of behavior,' applicable to the trust relationship between the United States and the Native American people," justifies "departure from the *Chevron* norm." *Id.*; *see also, Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 n.8 (D.C. Cir.1988).

Despite this unusual departure from *Chevron*, the cannon of liberal construction in favor of the tribe has little impact upon the outcome of the statutory analysis. On its face, the portion of the Act of 1970 relied upon by the DOI is not ambiguous, it authorizes the DOI to approve the "procedures" established for the "popular select[ion]" of the chief of the Seminole Nation. Act of October 22, 1970, Pub. L. 91-495, 84 Stat. 1091. Even this plain language permits a colorable argument that the removal of the Freedmen from membership in the Nation falls within the ambit of that provision. Certainly the denial of voting rights to the

Freedmen, which constitute as much as one-third of the membership of the Nation, will have a significant impact upon the selection of the chief. Thus, there is some question as to how the unambiguous language of the statute applies to the specific facts of this case.

Adhering to the aforementioned cannon of construction that "statutes are to be construed liberally in favor of the Indians," *Cobell*, 240 F.3d at 1101 (quoting *Blackfeet Tribe of Indians*, 471 U.S. at 766), the Court concludes that the Act of 1970 vests the DOI with the authority to approve or disapprove of some of the 2000 Amendments to the Seminole Constitution, specifically, the amendments which would limit the chief to the service of two terms and which would remove the Freedmen from membership in the Nation. As noted above, the rule requiring construction of the statute in favor of the Nation does not substantially impact upon the Court's determination because the procedures for popular election of the chief of the Seminole Nation are clearly provided in the Seminole Constitution and leave little question that alteration of Article II to remove the Freedmen from the Nation will fall within the discretion provided in the Act of 1970. Article III of the Seminole Constitution vests the executive authority of the Nation in a "chief and an assistant chief' and provides that the chief and assistant chief shall be elected "pursuant to the provisions of Article X of this constitution." Admin. R., Doc. 3 at 1. Article X provides that "[every member of the Seminole Nation of Oklahoma as defined in Article II of this constitution shall be eligible to vote in any general or special election." *Id.* at 6. Article II's definition is incorporated into the procedures for electing the chief, as set forth in Article X. *Id.* Thus, alteration of Article 11's definition of "member" changes the procedures pursuant to which the Nation's chief is elected. Likewise, because the addition of a term limiting provision to Article III of the Seminole Constitution alters the eligibility requirements for the position of chief, such

amendment can be said to alter the procedure by which the chief is elected. Regardless of this construction, however, as the Court has already determined that the DOI was authorized to act pursuant to the Article XIII of the Seminole Constitution, the Act of 1970 merely provides an additional basis pursuant to which the DOI could act.

C. *Reasonableness of the DOI's Rejection of the 2000 Amendments to the Seminole Constitution*

Having concluded in Subpart A, above, that the DOI is authorized, pursuant to Article XIII of the Seminole Constitution, to approve or disapprove any amendment to the Seminole Constitution, and in Subpart B, above, that the DOI is independently authorized pursuant to the Act of 1970 to approve or disapprove amendments affecting the selection of the chief, the Court must address whether the DOI acted reasonably in rejecting all of the July 1, 2000, amendments. The overarching justification for the DOI's blanket rejection of the amendments appears to be the mere fact that the Nation did not submit the amendments for approval. Admin. R., Doc. 20 (letter dated 9/29/00) at 2. In addition to this justification, the DOI's "final decision" expresses concern that the Nation has not provided any justification for its removal of the Freedmen from the Nation and indicates that the removal of the Freedmen is a violation of Article II of the Treaty of March 21, 1866, 14 Stat. 755, 756, as well as the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302. *Id.* at 1. Upon rejecting all of the July 1, 2000, amendments, the DOI alerts the Nation that "for purposes of carrying out the government-to-government relationship between the United States and the Seminole Nation of Oklahoma, [the DOI] will not recognize any future resolutions or actions of the General Council." *Id.*

Plaintiff insists that the DOI rejection of its amendments to its Constitution is not only outside the DOI's authority, but is not a "reasoned" Pl. Mem. at 18. Specifically, Plaintiff argues that the DOI has failed to discuss the "factors and facts which provide the basis for its decision." *Id.* at 19. Although Plaintiff alleges that the DOI failed to provide a basis for its underlying assumption that the DOI has the authority to approve or disapprove amendments to the Seminole Constitution, the DOI's final decision, as memorialized in a letter dated September 29, 2000, does exactly that. It provides: "In 1993 the Seminole Nation argued that the proposed amendments to the Nation's constitution did not need to be approved by the BIA. The Interior Board of Indian Appeals (IBIA) rejected these arguments." Admin. R., Ex. 20 at 2 n. 1. Plaintiff, however, is correct in asserting that the DOI did not explain why Plaintiff's failure to submit the proposed amendments for approval should be the determinative factor in Defendant DOI's decision to approve or disapprove the amendments. Pl. Mem. at 19.

Article XIII of the Seminole Constitution does not give any parameters or indication as to the manner in which the DOI must exercise its discretion to approve or disapprove amendments to the Constitution. Admin. R., Doc. 3 at 9. In its memoranda to the Court, the DOI does not directly address its justification for a blanket disapproval of the amendments to the Seminole Constitution. Thus, with regard to the amendments which do not affect the membership of the Freedmen in the Seminole Nation, the Court is left only with the brief statement provided in the September 29, 2000, letter to the effect that the amendments are disapproved because they were not submitted for approval.

A court may "uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned." *Motor Vehicle Mfrs.*, 463 U.S. at 43. With the exception of

the amendments affecting the Freedmen's membership, the DOI has not offered any rational objection to the substance of the July 1, 2000, amendments. Rather, the DOI appears to have deemed the amendments disapproved as a form of punishment for the Nation's failure to submit the amendments to the DOI for approval. While certainly a formal submission and request for approval would have been appropriate, there is no doubt that the DOI was aware of the proposed amendments and was fully informed as to their substance. As a result, it is difficult to view the Nation's refusal to submit the amendments, defiant though it may be, as cause to disapprove the same.

It scarcely needs repeating that the DOI, although authorized to act, "must act so as to avoid any unnecessary interference with a tribe's right to self-government." *Wheeler*, 811 F.2d at 353. With this rule in mind, the Court is hard pressed to say that the DOI has acted reasonably in issuing a blanket rejection of the July 1, 2000, amendments to the Seminole Constitution. Save a procedural defect, the DOI has offered absolutely no justification for rejection of the six proposed amendments to the Seminole Constitution which do not affect the status of the Freedmen. These amendments would, *inter alia*, establish a court system charged with interpreting Seminole law, vest the Nation's government with the ability to lay and collect taxes, vest the tribe's members with the power to conduct referenda, and limit the term of the Principal Chief. Having expressed no rational objection to the substance of these amendments, the Court cannot conclude that the DOI acted rationally in disapproving the amendments which do not affect the membership status of the Freedmen. Accordingly, DOI is not entitled to summary judgment on this issue. Instead, the Court shall remand the issue to the DOI for consideration of the substance of the amendments not affecting the Freedmen.

The same cannot be said of the amendments which purport to deny the Freedmen membership in the Nation. The DOI clearly expresses the basis for its objection to these amendments, pointing out that the Freedmen have been members of the Seminole Nation since 1866 and that their removal would violate both statute and treaty. Admin. R., Doc. 20 at 1. Plaintiff attacks this justification with the assertion that the treaty relied upon by the DOI, the Treaty of March 21, 1866, 14 Stat. 755, 756, has been subsequently abrogated by Congress. Pl. Opp. at 8. The Court cannot agree.

Article II of the Treaty of March 21, 1866, includes a covenant by the Seminole Nation abolishing slavery and stipulating that "persons of African descent and blood," living "among the Seminoles ... and their descendants, and such others of the same are as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens." 14 Stat. at 756. "[U]nless Congress makes clear its intent to abrogate a treaty, a court will not lightly infer such intent but will strive to harmonize the conflicting enactments." *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 936-37 (D.C. Cir. 1988); *Hodel*, 851 F.2d at 1443.

Plaintiff relies primarily upon the Curtis Act for the proposition that Congress abrogated the stipulation in Article II of the 1866 Treaty because the Curtis Act is a later act which is inconsistent with the Treaty. Pl. Opp. at 14. Plaintiff asserts that the language in the Curtis Act evidences an intent by Congress to abrogate the 1866 Treaty's inclusion of the Freedmen in the Seminole Nation. Specifically, Plaintiff focuses on the language in Section 21 in the Curtis Act which provides:

> [The Dawes Commission] is authorized and directed to make correct rolls of the citizens

> by blood of [the Seminole Nation], eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made ....
>
> The rolls so made, when approved by the Secretary of the Interior shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

Act of June 28, 1 898 ("Curtis Act"), 30 Stat. 549, 502 (not codified). Pursuant to this language, Plaintiff argues that the Dawes Commission's recordation of the Freedmen on a separate roll as the Freedman members of the Seminole Tribe exceeded the authority granted by the Curtis Act to "make correct rolls of citizens by blood." Pl. Opp. at 13-14. Plaintiff contends that the Curtis Act called for the enrollment of only blood citizens in the Seminole Tribe and thus, contradicts Article II of the 1866 Treaty.

While there is no doubt that the Curtis Act referred to a roll of citizens by blood, the historical fact remains that the Dawes Commission created a separate roll for the Seminole Freedmen. *See Goat v. United States*, 224 U.S. 458, 468 (1912). Plaintiff contends that the Commission's recordation of the Freedmen Roll of the Seminole Nation was without authority, and was, therefore, "illegal." Pl. Opp. at 15. The Court of Claims twice rejected this contention stating:

> The plaintiff sedulously contends that the above paragraph was intended to and did limit

the authority of the Commission, in enrolling Seminoles, to full-blood Indians and no other persons; and that the Commission in enrolling Seminole freedmen went beyond its jurisdiction. This argument is predicated upon the fact that section 21 of the act contains no mention of the Seminoles by name, and that therefore they are necessarily embraced within the words "correct rolls of the citizens by blood of all the other tribes."

The contention is without merit. There is nothing in the language of the section that accomplishes more than a direction to the Commission to make a roll of full-blood Indians, and at the same time eliminate from existing full-blood rolls such persons who procured enrollment by fraud or were unlawfully thereon. Nowhere does it appear that Congress was intending to prohibit the Commission from enrolling persons who were entitled to be enrolled by law on a separate roll though not of the full-blood. The Commission was engaged in making a roll "of the citizenship of the several tribes as required by law." The section is directory and points out what the Commission should do as to certain classes of persons.

...

The [Curtis Act] directs a correct roll of full-bloods, and the [Original Seminole Agreement, 30 Stat. 567,] authorizes allotments in accord with the Commissions's enrollment of persons as members of the tribe and this is precisely what the Commission did.

> The full bloods were enrolled upon one roll, and the freedmen upon a separate roll.

Seminole Nation v. United States, 78 Ct. Cl. 455, 468-70 (Ct. Cl. 1933); see also *Seminole Nation v. United States*, 90 Ct. Cl. 151, 157 (Ct. Cl. 1940) ("The question presented is identical with that which was raised by the demurrer and which was decided by Chief Justice Booth in a learned and elaborate opinion. We can see no benefit to be gained by another opinion on the issue.") (citation omitted).

Furthermore, the language so heavily relied upon by Plaintiff that "the rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon ... shall alone constitute the several tribes which they represent," Curtis Act, 30 Stat. 496, 502-04 (Section 21), only reinforces the Freedmen's participation on equal footing with the other blood-members of the Tribe. Like Section 21 of the Curtis Act, the Supplemental Seminole Agreement, 31 Stat. 250, also cited by Plaintiff, states that "the rolls so made, when approved by the Secretary of the Interior, as provided by said act of Congress, shall constitute the final rolls of Seminole Citizens." Supplemental Seminole Agreement (June 2, 1900), 31 Stat. 250 (not codified). When the rolls of the Five Civilized Tribes compiled by the Dawes Commission were finally completed and submitted for approval to the Secretary of the DOI they included the names of 2147 Seminole citizens by blood, and 986 Freedmen citizens of the Seminole Nation. *Seminole Nation*, 90 Ct. Cl at 156. "On or prior to March 4, 1907," the Secretary of the Interior approved these rolls. *Id.* It appears further that "the rolls thus made were approved by act [of Congress on] March 3, 1905, (33 Stat. 1048, 1071), except an authorization to extend the rolls `for ninety days after the date of approval of this Act to receive and consider applications for enrollment of infant children born prior to March 4, 1905, and living on said latter date, to

citizens of the Seminole tribe whose enrollment has been approved by the Secretary of the Interior.'" *Seminole Nation*, 78 Ct. Cl. at 472 (quoting 33 Stat. 1048, 1071). Thus, the Court of Claims confirms that the Freedmen appeared upon the "rolls so made," in accordance with the 1866 Treaty.

Without addressing either the 1933 or 1940 holdings of the Court of Claims, Plaintiff cites to the Act of April 26, 1906, as support for the proposition that "the Seminole Freedmen were not enrolled on the final rolls of the Seminole Nation of Oklahoma and no roll containing the Freedmen was ever approved by Article II of the Act of April 26, 1906." Pl. Opp. at 14-15. Plaintiffs assertions, though true enough in words, are misleading. The Act of April 26, 1906, describes itself as "[a]n Act To provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory." 34 Stat. 137. The first section of the Act provides time limitations during which a person may be enrolled as a "citizen or freedman of the Choctaw, Chicasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory." *Id.* (Section 1). Section Four of the Act implies, if not confirms, that the Secretary has approved a freedmen roll of the Seminole Tribe, stating that "no name shall be transferred from the *approved freedmen, or any other approved rolls* of the ... Seminole tribe, respectively, to the roll of citizens by blood, unless ..... *Id.* at 138 (Section 4). The specific portion of the Act relied upon by Plaintiff, Section 28, does not concern membership, nor does it make any mention of the *Id.* at 148. Rather, Section 28 provides in part that "the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect." *Id.* at 148 (Section 28). Section 28 goes on to place certain restrictions upon the acts and resolutions of the tribal councils and the contracting ability of the tribes. *Id.* Nowhere in Section 28 is there any indication that the Freedmen roll of the Seminole Tribe was rejected, rather than approved by the

Secretary of the DOI. As a result, Plaintiff's reliance upon the Act of April 26, 1906, is without effect.

Most damaging to Plaintiff s assertion that the 1866 Treaty was abrogated by the Curtis Act is the language cited by Plaintiff itself in *Goat v. United States*. In *Goat*, the Supreme Court implicitly acknowledged the continued validity of the Treaty of 1866 following the passage of the Curtis Act:

> The [enrolled Seminole] freedmen were persons of African descent,--embracing former slaves and their descendants,-- who had been admitted to the rights of native citizens under the treaty of 1866. Report of Dawes Commission, 1898, pp. 11, 13. While the law did not prescribe that a separate roll of freedmen should be made in the case of the Seminoles, the commission in fact made one. As to this they said in their report for 1898 (p. 13), referring to the Seminoles: "Indeed, it is essentially a nation of full bloods, save as to its colored citizens, who, *under treaty provision*, are on an equal footing with the citizens by blood. About one third of the citizens of the Seminole Nation are freedmen, and while the law does not specifically require a separate roll of each of these classes, the commission's data will enable it to so separate them." Accordingly the freedmen in the rolls of the Seminoles, upon which the allotments were based, appear as a class distinct from the citizens by blood. Final Rolls of Citizens and Freedmen of the Five Civilized Tribes, pp. 615, 627.

Goat, 224 U.S. at 468 (emphasis added). The *Goat* Court accepted and recited the explanation of the Dawes Commission in 1898, that the Seminole Freedmen were, pursuant to treaty, "on equal footing with the citizens by blood." *Id.* In doing so, the Supreme Court effectively foreclosed the conclusion that the statute which underlies the creation of the Dawes Commission and the Seminole Rolls, the Curtis Act, abrogated the Treaty of 1866. Thus, Plaintiffs reliance upon *Goat* to support the view that the Treaty of 1866 has been abrogated by the Curtis Act is unavailing.

Far more recently, the U.S. Court of Appeals for the Tenth Circuit acknowledged the continued validity of the Treaty of 1866 following the Curtis Act, stating, "[n]otwithstanding the separate classification of the Freedmen Seminoles by the Dawes Commission, a treaty [was] entered into by the United States and the Seminole Nation in 1866 (the "1866 Treaty'), *and* [was] *in effect at the time the Dawes Rolls were created .....*" *Davis v. United States*, 192 F.3d 951, 954 (10th Cir. 1999) (emphasis added). Based upon Supreme Court precedent, two opinions from the Court of Claims, and the more recent opinion from the Tenth Circuit, the Court rejects Plaintiff's assertion that the Curtis Act abrogated the guarantee of equal treatment by the Seminole Nation in the 1866 Treaty.

Plaintiff also relies upon a regulation promulgated pursuant to the Snyder Act, 25 U.S.C. § 13, which concerns the expenditure of appropriations by the BIA. The Snyder Act governs expenditures by the BIA, under supervision of the Secretary of the DOI, for the "benefit, care, and assistance of the Indians." 25 U.S.C. § 13. The regulation upon which Plaintiff relies limits eligibility for federal assistance to individual Indians with a certain degree of "Native blood." 25 C.F.R. 20.20. Contrary to Plaintiff's argument, this limitation does not support an inference that Freedmen, who do not possess "Native blood" are not to be

treated as members of the Seminole Nation. By its terms, this regulation addresses only individual eligibility for benefits conferred by the federal government. The regulation does not appear to have any impact upon the status of the Freedmen within the Seminole Nation and thus, does not impact upon the validity of the 1866 Treaty.

In addition, Plaintiff cites, in passing, to Chapter 199 of the Act of May 27, 1908, 35 Stat. 312 (not codified), which, like the Curtis Act, concerns land allotment. Plaintiff argues that because the Act of May 27, 1908, does not refer specifically to the Freedmen Seminoles with regard to lifting restrictions on the alienation of land, the Act abrogates the 1866 Treaty. Pl. Opp. at 16. Plaintiff's argument in this regard is plainly without foundation. The mere fact that Congress has not referred to the Freedmen Seminoles in an Act concerning alienation restrictions cannot be said to evince a "clear intent" to abrogate a treaty which covenants that the Seminole Nation shall confer "all the rights of native citizens" upon the Freedmen.

Plaintiff also argues that failure of the "original Seminole Agreement" in 1897 to specifically mention the Freedmen or Estelusti in discussing the lands belonging to the Seminoles indicates abrogation. Plaintiff makes the identical argument with regard to the "Supplemental Seminole Agreement" of June 2, 1990, which fails to mention the Estelusti or Freedmen in the context of land allotment. The Court of Claims long ago addressed and rejected these same arguments:

> Th[e Original Seminole Agreement] executed by the parties, involving the allotment of their lands and distribution of their tribal funds, recites that the lands of the Seminoles shall be divided into three classes, and appraised when classified at the sums fixed in the agreement,

thereafter "shall be divided among the members of the tribe so that each shall have an equal share thereof in value", etc.

The plaintiff says that "members of the tribe" are restricted to an enrollment of the full-bloods, because the Curtis Act and the agreement being in pari materia, the authorization in the former to make a roll of full-bloods determines the meaning of the words "members of the tribe." . . . It is true certain classes possessed certain rights, but obviously the population of the tribe when considered as a unit or individually were members of the same. The membership embraced all classes. There is nothing in the way of giving effect to both the Curtis Act and the agreement. The former directs a correct roll of full-bloods, and the latter authorizes allotments in accord with the Commission's enrollment of persons as members of the tribe; and this is precisely what the Commission did. The full-bloods were enrolled upon one roll, and the freedmen upon a separate roll.

The second Seminole agreement (31 Stat. 250) confirms by express provisions what has just been said. This agreement, like the first one, received the approval of the Indians and was ratified by Congress on June 2, 1900.... If there was ever any congressional intention, which we do not think there vas, to limit the Seminole rolls to members, meaning full-bloods, in previous legislation the above provision of the agreement discloses a positive and express reversal of the policy, and undoubtedly extends the roll to citizens.

> The lands are to be allotted in accord with a final roll of Seminole citizens and no other persons.

Seminole Nation, 78 Ct. Cl. 469-70. Plaintiff fails to distinguish or even address this precedent which contradicts its arguments before this Court, nor does Plaintiff offer precedent which supports its view. Not surprisingly, this Court has not located any case or other authority which espouses the view endorsed by Plaintiffs. Plaintiff's argument with regard to the two Seminole Agreements rests entirely on the fact that neither agreement makes specific reference to the Freedmen. Yet, Plaintiff has offered no authority which indicates that an "agreement" like the two at issue here, can signal abrogation of treaty. In the complete absence of authority, the Court remains unconvinced that the mere non-mention of the Freedmen in two "agreements" between the United States and the Nation suffices as a clear showing of Congressional intent to abrogate the Treaty of 1866. As a result, Plaintiffs reliance upon the language in the two Seminole Agreements fails to impact upon the Court's view that the 1866 Treaty continues to bind the United States and Seminole governments.[6]

Because the Treaty of 1866 has not been abrogated by subsequent agreement or statute, there can be no other conclusion but that it remains in force. As a result, the DOI's

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[6] Plaintiff makes the specious assertion in its opposition memoranda that due to allegedly "execrable conditions before and while the treaty was being 'negotiated' . . . at least under current concepts of international law there is at least a colorable basis for the Seminole withdrawing [sic] their consent to the treaty." 9. Notwithstanding this statement, the Nation does not appear to have formally withdrawn its "consent to the treaty," nor does the Nation offer any authority which indicates that a sovereign may do so in a litigation document.

refusal to approve the Nation's amendments to its Constitution purporting to remove the Freedmen is appropriate, as such removal appears to violate the Treaty of 1866. Therefore, the Court holds that the DOI did not act arbitrarily and capriciously in refusing to approve these select amendments to the Seminole Constitution.[7]

Furthermore, the DOI's ultimate determination not to recognize the acts of the Nation in the absence of the Freedmen is also not without rational justification. As explained in the Secretary's final decision "the United States cannot discharge its trust responsibilities to the Seminole Nation through the General Council because that governing body is no longer lawfully constituted." Admin. R., Doc. 20 at 2. Given that the DOI has concluded that the removal of the Freedmen violates a treaty between the Seminole Nation and the United States, a refusal to deal with the Nation in the absence of the Freedmen is not unreasonable. Accordingly, the Court concludes that inasmuch as Plaintiff challenges Defendant DOI's refusal to conduct a government-to-government relationship with the Seminole Nation through

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[7] As previously noted, the final decision of the DOI also cites to the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, as a basis for rejection of the amendment removing the Freedmen from the Nation. Admin R., Doc. 20 at 1. The DOI does not explain its reliance on the Indian Civil Rights Act in either the final decision or in its memoranda to this Court. In fact, the DOI addresses the Indian Civil Rights Act only in a footnote in its memorandum in support of its cross-motion for summary judgment, stating in full, "Moreover, if the proposed constitutional amendments are deemed to be in violation of the Indian Civil Rights Act of 1968, then the BIA will have an additional basis for rejecting them." Def. Mem. at 19 n.8. Because neither the DOI, nor the Nation addresses whether the proposed removal of the Freedmen from the Seminole Nation violates the Indian Civil Rights Act, the Court will not address that purported basis for DOI's determination in this Memorandum Opinion.

the Nation's General Council in the absence of the Freedmen, Defendants are entitled to summary judgment on this issue.

IV. CONCLUSION

Based upon the foregoing, the Court concludes that Defendants are entitled to summary judgment with regard to the Secretary's rejection of the three amendments which purport to remove the Freedmen from membership in the Seminole Nation of Oklahoma. The DOI properly possessed the authority pursuant to Article XIII of the Seminole Constitution, and pursuant to the Act of October 22, 1970, to approve or disapprove proposed amendments to the Seminole Constitution. The DOI did not act unreasonably in exercising this power to reject the three proposed amendments to the Constitution which would affect the status of the Freedmen in violation of the Treaty of 1866. As a result, the DOI's ensuing decision not to recognize actions of the Seminole Nation in the absence of the Freedmen was not arbitrary and capricious. However, although empowered by Article XIII of the Seminole Constitution to approve or reject amendments to the Constitution, the DOI did not act reasonably in rejecting the remaining proposed amendments to the Seminole Constitution on the sole grounds that the Seminole Nation failed to properly "submit" those proposed amendments for DOI review. Accordingly, the DOI is not entitled to summary judgment with regard to its rejection of these amendments. Because the DOI has not yet addressed the substance of the remaining proposed amendments to the Seminole Constitution, the Court shall remand to the DOI for a determination of approval or rejection which addresses the substance of the proposed amendments which do not affect the status of the Freemen in the tribe. An appropriate Order accompanies this Memorandum Opinion.

September 27, 2001

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

(3)

No. 03-1313

In the Supreme Court of the United States

SYLVIA DAVIS, AS GUARDIAN AND NEXT FRIEND FOR DONNELL E. DAVIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court did not abuse its discretion in determining that the Seminole Nation of Oklahoma (the Tribe) is an indispensable party to a claim challenging eligibility requirements prescribed by the Tribe for benefits administered by the Tribe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 343 F.3d 1282. An earlier opinion of the court of appeals (Pet. App. 56a-75a) is reported at 192 F.3d 951. The opinion of the district court (Pet. App. 25a-55a) is reported at 199 F. Supp. 2d 1164. An earlier opinion of the district court (Pet. App. 76a-88a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2003. A petition for rehearing was denied on December 16, 2003 (Pet. App. 89a-90a). The petition for a writ of certiorari was filed on March 15, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, two bands of the Seminole Nation of Oklahoma and an individual, filed this suit against the United States (and Department of Interior officials) to obtain the benefits of certain programs established and administered by the Seminole Nation of Oklahoma (the Tribe or the Seminole Nation) through tribal ordinances. Petitioners did not sue the Seminole Nation. The district court found that the Seminole Nation is an indispensable party and granted summary judgment to respondents. Pet. App. 25a-55a. The court of appeals affirmed. *Id.* at 1a-24a.

1. a. In August 1950 and July 1951, the Seminole Nation of Oklahoma and the Seminole Indians of Florida filed separate claims with the Indian Claims Commission (ICC) seeking compensation for tribal lands in Florida that were ceded to the United States in the Treaties of Camp Moultrie (1823) and Payne's Landing (1832). *Seminole Indians* v. *United States*, 38 Ind. Cl. C. 62, 63 (1976). The claims were tried as a consolidated case. *Ibid.* In April 1976, the ICC approved the parties' "proposed compromise settlement" and entered a final judgment of $16 million in favor of the Seminole Indians of Florida and the Seminole Nation of Oklahoma "on behalf of the Seminole Nation as it existed in Florida on September 18, 1823." *Id.* at 90; see Pet. App. 30a. With interest, the amount of the award was approximately $56 million. *Ibid.*

The Distribution of Judgment Act, 25 U.S.C. 1401 *et seq.*, sets forth general guidelines for judgment funds awarded by the ICC or the United States Court of Federal Claims. 25 U.S.C. 1402; Pet. App. 94a-95a. The Act requires the Secretary of the Interior (the Secretary) to prepare and submit to Congress a plan for the

use and distribution of monies appropriated for judgment funds. *Ibid.* In June 1976, pursuant to the ICC judgment in favor of the Seminole Nation of Oklahoma and the Seminole Indians of Florida, Congress appropriated Judgment Fund monies in the amount of $16 million plus interest to the Seminole Nation. Act of June 1, 1976, Pub. L. No. 94-303, Tit. I, Ch. XII, 90 Stat. 629; Pet. App. 81a. From 1977 to 1990, however, no final use and distribution plan was enacted or became operative. *Id.* at 33a n.3.

In April 1990, Congress enacted the Indian Claims Distribution of Funds to Seminole Indians Act (the 1990 Distribution Act), which superseded the 1973 Distribution of Judgment Act with respect to the Seminole Nation Judgment Fund. Pub. L. No. 101-277, § 1, 104 Stat. 143. The 1990 Distribution Act allocated the previously appropriated Judgment Fund monies among the Florida and Oklahoma tribes. It also granted the Oklahoma Tribe the authority to propose a general plan for the use and distribution of the Tribe's Judgment Fund. § 3, 104 Stat. 143. Congress authorized "the governing body of the Seminole Nation of Oklahoma[,] in consultation with the Secretary of the Interior," to prepare a "plan for the use and distribution of the funds allocated to the Seminole Nation of Oklahoma." *Ibid.* The 1990 Distribution Act further provides that "[a]ny plan for the use and distribution of the funds allocated to the Seminole Nation of Oklahoma shall provide that not less than 80 per centum thereof shall be set aside and programmed to serve common tribal needs, educational requirements, and such other purposes as the circumstances of the Seminole Nation of Oklahoma may determine." § 4(a), 104 Stat. 143; Pet. App. 92a-93a.

b. The 1990 Distribution Act does not prescribe or address eligibility requirements for participation in

programs funded by the Judgment Fund. In accordance with Section 3(a) of the 1990 Distribution Act, 104 Stat. 143, the Seminole Nation developed the "1991 Usage Plan" (the Plan). As required by Section 3(a) of the 1990 Distribution Act, the Secretary submitted the Plan to Congress on January 30, 1991, with a recommendation that it be approved. 56 Fed. Reg. 32,480 (1991); Pet. App. 36a. The Plan became effective 60 days later, as provided by Section 4(d) of the 1990 Distribution Act, 104 Stat. 144. Pet. App. 36a; C.A. Supp. App. SA065, SA161-SA162.

The 1991 Usage Plan is a general plan for the use and distribution of the Tribe's Judgment Fund and provides that the Judgment Fund "shall be available for use by the tribal governing body on a budgetary basis for programs and services established in accordance with priorities determined by the tribal governing body." 56 Fed. Reg. at 32,480. The role of the Bureau of Indian Affairs (BIA) with respect to the programs is limited to releasing funds from the Tribe's Judgment Fund Account for the Tribe's use under the Plan as long as the planned expenditures are in accordance with the 1990 Distribution Act and the Plan. C.A. Supp. App. SA065.

The Tribe has established and implemented Judgment Fund programs and services through tribal ordinances. Pet. App. 61a, 68a; C.A. Supp. App. SA077-SA079. As provided in those ordinances, the Tribe receives and processes applications for participation in Judgment Fund programs. The Tribe determines the eligibility requirements for participation in each program. Many Judgment Fund Programs require, consistent with the terms of the ICC's award, see Pet. App. 30a, that an eligible program applicant "be an enrolled member of the Seminole Nation of Oklahoma

who has been determined to have descended from a member of the Seminole Nation as it existed in Florida on September 18, 1823" (the eligibility requirement). Pet. App. 7a, 61a.[1]

c. Petitioners Dosar-Barkus Band and Bruner Band are two of the fourteen separate bands of the Seminole Nation. Following the United States Civil War, the Seminole Nation and the United States entered into the Treaty of March 21, 1866. Art. I, 14 Stat. 755; Pet. App. 91a. The treaty provided that slavery was not to exist among the Seminoles, and stated that persons of African descent among the Seminoles (who were sometimes referred to as the Estelusti) were to "have and enjoy all the rights of native citizens, and the laws of [the Seminole] nation [were to] be equally binding upon all persons of whatever race or color," who may be accepted as citizens or members of said tribe. *Ibid.*

Thereafter, tribal members of African descent organized into two "Freedmen" bands—the Dosar-Barkus Band and the Bruner Band. Pet. App. 2a-4a. Because the members of those bands were not recognized members of the Tribe until the Treaty of 1866, the Tribe has not allowed them to participate in those Judgment Fund programs established by the Tribe that condition participation on descent from a member of the Tribe "as it existed in Florida on September 18, 1823." *Id.* at 7a, 61a.

2. Petitioners brought suit challenging their exclusion from Judgment Fund programs under the 1823 eligibility requirement, contending that the requirement violates the 1990 Distribution Act. Pet. App. 2a,

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[1] At least one Judgment Fund program, the Culture and Recreation Enhancement Assistance Program, does not include that requirement. C.A. Supp. App. SA163-SA167.

8a, 62a-63a.[2] Respondents sought dismissal on several grounds, including failure to join the Tribe as an indispensable party under Federal Rule of Civil Procedure 19. *Id.* at 87a.

a. The district court dismissed the claim, ruling that, under *Fletcher* v. *United States*, 116 F.3d 1315 (10th Cir. 1997), "the Seminole Nation of Oklahoma is an indispensable party that cannot be joined on account of sovereign immunity." Pet. App. 87a.

b. The court of appeals reversed and remanded. Pet. App. 56a-75a. The court agreed with the district court that the Tribe is a necessary party under Rule 19(a). *Id.* at 65a-69a. The court of appeals disagreed, however, with the district court's conclusion that *Fletcher* conclusively resolved the Tribe's "indispensability" for purposes of Rule 19(b). *Id.* at 69a-73a. The court therefore "remand[ed] to the district court to conduct an analysis of all the factors articulated in Rule 19(b) and make a reviewable determination as to whether the Tribe is an indispensable party." *Id.* at 73a.

c. On remand, the district court granted respondents summary judgment, again ruling that the Tribe is an indispensable party. Pet. App. 25a-55a. The court considered and weighed each of the factors set forth in Rule 19(b) in reaching that conclusion. *Id.* at 44a-50a.

With respect to the extent to which a judgment rendered without the Tribe's presence could be prejudicial to the Tribe, the court explained that a judg-

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[2] In addition to their claim concerning the Judgment Fund, petitioners also challenged the refusal of the BIA to issue them "Certificates of Degree of Indian Blood." See Pet. App. 63a. The district court dismissed that claim based on a failure to exhaust administrative remedies, *id.* at 50a-54a, and the court of appeals affirmed that ruling, *id.* at 20a-24a. Petitioners do not seek this Court's review of those rulings.

ment for petitioners requiring the Tribe to provide them Judgment Fund benefits "would, in effect, reverse the decisions of the Tribe's governing body, and significantly interfere with the Tribe's ability to govern its programs." Pet. App. 47a. Next, the court explained that "there is no way to shape relief that would lessen or avoid the prejudice to the absent Tribe," *ibid.*, and that there was a "very real possibility that [respondents] would incur a substantial risk of inconsistent legal obligations if the BIA officials were subsequently sued by the Seminole Nation for actions taken in violation of tribal law," *id.* at 48a. The court further found that a judgment in favor of petitioners "would not necessarily afford complete relief because" it "will not have a binding effect on the absent Tribe" or "on the manner in which the Tribe runs its tribal programs." *Ibid.* Finally, the court held that, while respondents have no alternative forum in which their claim can be heard, that consideration was outweighed by the other factors. *Id.* at 49a-50a. The court therefore concluded that "the prejudice to the absent Tribe, the Court's inability to lessen the prejudice and the absence of an adequate remedy without the Tribe's joinder prevent proceeding in equity and good conscience." *Ibid.*

d. The court of appeals affirmed, holding that the district court had not abused its discretion in ruling that the Tribe was an indispensable party. Pet. App. 1a-24a. The court agreed with the district court's analysis of each of the Rule 19(b) factors.

The court first agreed with the district court's conclusion that there could be prejudice to the Tribe if the case were to proceed in the Tribe's absence. Pet. App. 13a-16a. The court rejected petitioners' argument that the Tribe's interest is legally frivolous because it is an

"interest in excluding the Estelusti from the Judgment Fund." *Id.* at 13a. The court explained that, whereas Rule 19 is concerned with prejudice to "*claimed* interest[s]," Fed. R. Civ. P. 19(a) (emphasis added), petitioners' argument "amount[ed] to asking [the court] to decide that the Tribe's 'interest' is not worthy of consideration because its position is wrong on the merits." *Ibid.*

With respect to whether the prejudice to the absent party could be lessened or avoided, petitioners relied solely on their contention that the prejudice to the Tribe was legally irrelevant because, in their view, the Tribe had no lawful interest in excluding them from programs supported by the Judgment Fund. Pet. App. 16a. The court of appeals rejected that argument based on the court's determination that the Tribe's interests could be prejudiced. *Ibid.*

The court of appeals also agreed with the district court's conclusion that a judgment entered in the Tribe's absence would be inadequate for Rule 19 purposes. Pet. App. 16a-17a. The court explained that, while petitioners argued that a judgment would afford them complete relief, that argument "miscontrue[d] the nature of the adequacy inquiry." *Id.* at 16a. The question is not whether the judgment would be adequate "from the plaintiff's point of view," but whether it would be adequate from the perspective of the public interest in "complete, consistent, and efficient settlement of controversies." *Id.* at 17a (quoting *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 111 (1968)). Here, the court concluded, "a judgment rendered in the Tribe's absence could well lead to further litigation and possible inconsistent judgments." *Ibid.*

Finally, the court of appeals explained that "the plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit." Pet. App. 18a. Thus, the court held that, "[w]hen viewed in light of the Tribe's sovereign immunity and the first three Rule 19(b) factors, we do not believe that the absence of an alternative forum weighs so heavily against dismissal that the district court abused its discretion." *Id.* at 19a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review therefore is not warranted.

1. Petitioners contend (Pet. 10-16) that the court of appeals' decision conflicts with this Court's decision in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968). That argument lacks merit.

Provident explained that "Rule 19(b) suggests four 'interests' that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled." 390 U.S. at 109. In *Provident*, the court of appeals' decision reversed by this Court had completely disregarded Rule 19 in determining that the litigation should not have gone forward without the absent party. *Id.* at 106-107, 116, 128. Here, by contrast, both the district court and court of appeals considered each of the Rule 19 interests identified in *Provident* and determined that, in equity and good conscience, the case should not go forward without the Tribe, and that the Tribe could not be

joined because of its sovereign immunity. Pet. App. 11a-20a, 44a-50a.

Petitioners nonetheless maintain that the court of appeals' analysis is inconsistent with *Provident* because the court "turn[ed] a blind eye" to what is at stake for the Tribe and "failed even to identify the supposed interest of the Tribe, let alone to consider whether that interest 'really exists.'" Pet. 11, 12. That is incorrect. In its first opinion, in holding that the Tribe is a necessary party under Rule 19(a), the court of appeals explained that the "Tribe has determined the eligibility criteria for participation in [Judgment Fund] programs and has adopted ordinances containing the Eligibility Requirement." Pet. App. 68a. As a result, the court reasoned, a "ruling on the merits in favor of [petitioners] on their Judgment Fund Award claim will have the practical effect of modifying the Tribal ordinances containing the Eligibility Requirement. Unless the Tribe is a party to the lawsuit, it has no ability to protect its claimed interest in determining eligibility requirements." *Ibid.* The court further explained that the "Tribe's claimed interest in determining eligibility requirements and adopting ordinances embodying those requirements is neither fabricated nor frivolous. The disposition of [petitioners'] Judgment Fund Award claim in the Tribe's absence will impair or impede the Tribe's ability to protect its claimed interest." *Ibid.*

On remand, the district court found that "[a] favorable judgment for [petitioners] on their judgment fund award claim would, in effect, reverse the decisions of the Tribe's governing body, and significantly interfere with the Tribe's ability to govern its programs. Essentially, the Court would be defining who is eligible for participating in tribal programs." Pet. App. 47a. The court of appeals affirmed that conclusion, ruling that

the district court had not abused its discretion in holding that the Tribe would be prejudiced by a judgment in its absence. *Id.* at 16a. Indeed, because petitioners seek as relief that the Tribe be required to provide them Judgment Fund benefits, their claim not only seeks invalidation of the eligibility requirement contained in the Tribe's ordinances, but also effectively seeks establishment of new eligibility requirements for access to tribal programs supported by the Tribe's Judgment Fund.

Petitioners contend (Pet. 13-14) that the court of appeals was required to assess the ultimate merits of the Tribe's interest, arguing that the court's approach conflicts with this Court's suggestion in *Provident* that Rule 19's purpose is to achieve justice between all the parties in interest. See 390 U.S. at 116-117 n.2. Petitioners misread *Provident*. The Court's decision in *Provident* does not suggest that a court must assess the ultimate merits of the absent party's legal position in determining under Rule 19(b) whether the party is indispensable. As the court of appeals correctly explained, the "underlying merits of the litigation are irrelevant to a Rule 19 inquiry, at least unless the claimed interest is patently frivolous." Pet. App. 13a (internal quotation marks and citations omitted). The court's analysis is fully consistent with *Provident*, which held that the relevant inquiry is whether a judgment would harm or prejudice the absent party. 390 U.S. at 114-115. Although the *Provident* Court ultimately concluded that the absent party was not harmed or prejudiced by the adverse judgment in the particular

circumstances of that case,[3] here, the district court and court of appeals correctly concluded that a judgment in this case would harm and prejudice the absent Tribe.[4]

The court of appeals' decision also is consistent with the decisions of other courts of appeals. Rule 19 reflects the concern that "[j]ust adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest." *Shermoen* v. *United States*, 982 F.2d 1312, 1317 (9th Cir. 1992), cert. denied, 509 U.S. 903 (1993); see *Wichita & Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986). That is true "even if the dispute is ultimately resolved to the detriment of that party." *Shermoen*, 982 F.2d at 1317. "Thus, the joinder rule is to be applied so as to preserve the right of parties to make known their interests and legal theories." *Ibid.* (internal quotation marks and citation omitted). That is particularly the case where, as here, the absent party has an interest in preserving its sovereign immunity and the attendant right not to have its legal duties judicially determined absent its consent. *Ibid.*; accord *Wichita & Affiliated Tribes*, 788 F.2d at 777. In recognition of those principles, apart from ensuring that an

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[3] In *Provident*, the Rule 19 issue was raised for the first time on appeal, after a judgment had already been entered by the district court. 390 U.S. at 109, 114-115.

[4] As the court of appeals recognized, "in some cases the interests of the absent person are so aligned with those of one or more parties that the absent person's interests are, as a practical matter, protected." Pet. App. 15a. In this case, however, the district court found that "[t]he BIA is not representing the Seminole Nation's interest in this lawsuit," and petitioners did not challenge that conclusion on appeal. *Ibid.*; see *id.* at 68a ("Unless the Tribe is a party to the lawsuit, it has no ability to protect its claimed interest in determining eligibility requirements.").

absent party's claimed interest is not frivolous, courts have refused to disregard an absent party's claimed interest based on the merits of a plaintiff's claim. *American Greyhound Racing* v. *Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002); *Shermoen*, 982 F.2d at 1317; *Keweenaw Bay Indian Cmty.* v. *Michigan*, 11 F.3d 1341, 1347-1348 (6th Cir. 1993).[5]

2. Petitioners argue (Pet. 16-21) that the eligibility requirement tied to the 1823 date in the Indian Claims Commission's award is unlawful and that the Tribe's interest therefore is not legitimate or protected under Rule 19. That fact-specific issue does not warrant review.

As the court of appeals correctly explained, the relevant inquiry for purposes of Rule 19 is whether the Tribe's claimed interest is frivolous, not whether the interest ultimately has merit. Pet. App. 13a. Petitioners' argument is premised on a misidentification of the Tribe's interest. See Pet. 20 (arguing that "there is no right or interest which could be claimed by the absent Tribe to systematically exclude minority members of the Tribe"). As the court of appeals recognized, Pet. App. 6a; see *id.* at 33a, Congress left it to the Tribe to determine the eligibility requirements for participation in Judgment Fund programs by tribal members. The Tribe has adopted ordinances creating its Judgment Fund programs that contain an eligibility requirement that is tied to the 1823 date on which the Tribe as

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[5] Petitioners have not presented any question concerning the interaction of Rule 19 and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, when a person seeks judicial review of agency action under that Act. Nor do petitioners rely upon or cite the APA in the certiorari petition. This case therefore presents no occasion to consider issues concerning the APA.

then constituted ceded its lands. A judgment in petitioners' favor would effectively change the Tribe's ordinances containing the eligibility requirement and require it to depart from that date of legal and historical significance to the Tribe. A judgment for petitioners would impede the Tribe's sovereign ability to determine eligibility requirements for participation in programs paid for out of a Judgment Fund established to redress a wrong to the Tribe as constituted in 1823.

Indeed, the challenged eligibility requirement tracks the language of the Indian Claims Commission's award itself, which was entered in favor of "the Seminole Nation as it existed in Florida on September 8, 1823," Pet. App. 30a, and which was the basis for establishing the Judgment Fund. In addition, the 1990 Distribution Act provides that "[a]ny plan for the use and distribution of the funds allocated to the Seminole Nation of Oklahoma shall provide that not less than 80 per centum thereof shall be set aside and programmed to serve common tribal needs, educational requirements, *and such other purposes as the circumstances of the Seminole Nation of Oklahoma may determine.*" *Id.* at 92a (emphasis added). The Tribe's interest in tying eligibility under programs funded by the Judgment Fund to the terms of the award cannot be dismissed as baseless.[6]

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[6] Petitioners contend (Pet. 16-21) that the district court's "findings"—statements in the "Historical Background" section of the court's opinion—demonstrate that the Tribe's interest is illegal and therefore not worthy of consideration. The court, however, made no finding that petitioners have a statutory right to share in the Judgment Fund. In fact, the court concluded that "the provisions of the Distribution Act did not directly address the Black Seminoles' entitlement to share in the tribal programs." Pet. App.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2004

33a. The court also stated that its order "does not reflect any findings by the Court as to the merits of [petitioners'] Judgment Fund Award claim." *Id.* at 50a.

(2)

Supreme Court, U.S.
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In The
United States Supreme Court

SYLVIA DAVIS, AS GUARDIAN AND NEXT FRIEND FOR DONNELL E. DAVIS; DOSAR-BARKUS BAND OF THE SEMINOLE NATION OF OKLAHOMA; BRUBER BAND OF THE SEMINOLE NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES; DEPT. OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS; GALE NORTON, SECY. OF THE INTERIOR, HER AGENTS, EMPLOYEES AND SUCCESSORS; NEAL A. MCCALEB, ASST. SECY. OF THE INTERIOR FOR INDIAN AFFAIRS, HIS AGENTS, EMPLOYEES AND SUCCESSORS; GLORIA SPYBUCK, SUPERINTENDENT, BUREAU OF INDIAN AFFAIRS, WEWOKA AGENCY; AND JEANETTE HANNA, REG. DIRECTOR, BUREAU OF INDIAN AFFAIRS, EASTERN OKLAHOMA REG. OFFICER, HER AGENTS, EMPLOYEES AND SUCCESSORS,

Respondents.

On Petition for a Writ of Certiorari to the
U. S. Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae submits this brief in support of Petitioners Sylvia Davis *et al.*, with the written consent of the parties.[1] *Amicus Curiae* the Center for Constitutional Rights (the "Center") is a national non-profit legal, educational, and advocacy organization dedicated to advancing the rights guaranteed by the United States Constitution and international law. Founded in 1966 during the Civil Rights Movement, the Center has a long history of litigating cases on behalf of Native American nations and nation members, including claims by the Mohawk and Oneida nations to aboriginal lands and cases on behalf of nation members seeking to vindicate their civil and human rights.

ARGUMENT

I. FEDERAL POLICIES MANDATING THE ERADICATION OF RACE DISCRIMINATION AND THE FULFILLMENT OF NATIVE TREATY OBLIGATIONS DEMAND THE COURT'S CONSIDERATION OF THIS CASE

There can be no doubt that the twentieth century will long be remembered in American history as a period of intense struggle for human rights. The victories, however, were frequently won in the courthouse long before they were fully won in the hearts of the American people. Despite the formation of abolitionist groups in the 1800s, and the Union's victory over slavery in the Civil War, the nation

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[1]Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

made little progress toward securing civil and constitutional guarantees for African Americans until well into the twentieth century. Not until 1948 did this Court strike down, as unenforceable, land covenants that forbade the sale or rental of property to African Americans in *Shelley v. Kraemer*, 334 U.S. 1 (1948), and it was not until 1954 that the Court, in *Brown v. Board of Education*, 347 U.S. 483 (1954), ordered an end to segregated schools. Even these victories, however, brought little change to the lives of many suffering the effects of so many years of oppression. The Black Seminoles are among those people who continue to suffer under the weight of such discrimination – discrimination that comes at the hands of both the Seminole Tribe and the federal government and that continues unabated to this day. This case provides the Court with the opportunity to remedy a pernicious injustice and fulfill its historic role by eradicating this persistent form of racism.

The courts below failed to consider two crucial federal policies that should override the application of an equitable rule of discretion in this case. The lower courts' analysis under Rule 19 neglected to balance consideration of tribal sovereign immunity concerns against two long-standing government policies: (a) eradicating race discrimination in all of its manifestations, including those sanctioned by branches of the federal government and subordinate sovereigns; and (b) fostering tribal autonomy and fulfilling the fiduciary obligations created by the treaties between the government and Native nations.

The court of appeals committed two errors in holding that the Seminole Tribe is a necessary and indispensable party within the meaning of Rule 19 and affirming dismissal of the case. *Davis v. United States*, 343 F.3d 1282, 1294

(10th Cir. 2003) ("*Davis II*"). The court of appeals committed two errors. First, when the court considered whether allowing the action to proceed without the Tribe might be prejudicial to the Tribe's interest, it failed to evaluate whether that interest is a legally cognizable one. As demonstrated below, this omission renders the court's Rule 19(a) necessary party analysis fatally deficient. Second, by holding that tribal sovereign immunity cuts off the normal Rule 19 analysis, *id.* at 1293-94, the court improperly altered the Rule 19(b) indispensability analysis when it ignored the crucial fourth factor: "whether an adequate remedy can be found elsewhere," *Davis II*, 343 F.3d at 1293 – a factor which courts have held weighs heavily against dismissal. The court was obligated to weigh the federal policy in favor of tribal sovereign immunity against the federal government's fiduciary relationships with Native nations and their members and the government's unique role in eradicating race discrimination by all subordinate sovereigns – duties embodied in the 1866 Treaty with the Seminoles which was executed contemporaneously with the Civil War Amendments to the Constitution and undertaken for the same purposes.

A. The Tribe's Interest in Discriminating Against Its Black Members Is Not Legally Cognizable Within the Meaning of Rule 19

When a party moves for dismissal on Rule 19 grounds, courts must answer three questions: (i) should the absent party be joined (is the absentee necessary); (ii) if it should be joined, can it be joined; and (iii) if it cannot be joined, should the lawsuit proceed without it nonetheless. *See Western Maryland Ry. Co. v. Harbor Ins. Co.*, 910 F.2d 960, 961 (D.C. Cir. 1990).

The first question requires that the court determine whether the absent party has "an interest relating to the subject of the action." Fed. R. Civ. P. 19(a). Courts have consistently held that such an interest must be a "legally protected interest." *See, e.g., Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 49 (2d Cir. 1996) (quoting *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983)); *United States v. San Juan Bay Marina*, 239 F.3d 400, 406 (1st Cir. 2001). This Court's rulings make clear that neither an unconstitutional interest nor an interest which contravenes public policy can fulfill the "interest" requirement of Rule 19(a). *See, e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) (holding joinder of the United States unnecessary when grant of authority to federal official is unconstitutional or is exercised in an unconstitutional manner); *Work v. Louisiana*, 269 U.S. 250 (1925) (action permitted against Interior Secretary for rejecting state's claim to land based upon an unauthorized ruling of law); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912) (action permitted against Interior Secretary for wrongful fixing of limitations on riparian rights).

Here, the district court found that the Department of the Interior's Bureau of Indian Affairs ("BIA") and the absent tribe had conspired to push a trust fund distribution plan which excludes the Black Seminoles past the scrutiny of Congress. *See Davis*, 199 F. Supp. 2d at 1169-71. Simply put, the Seminole Tribe has no "legally protected interest" in creating and maintaining a racially discriminatory system. The foundational document establishing the sovereignty of the modern tribe, the Treaty of March 21, 1866, 14 Stat. 755, acknowledges that "Seminoles ... of African descent and blood" shall "have and enjoy all the rights of native citizens." This treaty was one of five signed in the

immediate aftermath of the Civil War by the federal government and those Native nations that had been aligned with the Confederacy.[2] *See* Felix S. Cohen, *Handbook of Federal Indian Law*, 104 (1982 ed.). These treaties guaranteed the abolition of slavery, and ensured that the rights accorded African Americans by the postwar amendments would be extended as well to African American Indians in their relations with Native nations.[3] *See* Natsu Taylor Saito, *From Slavery and Seminoles to Aids in South Africa: An Essay on Race and Property in International Law*, 45 Vill. L. Rev. 1135, 1173 (2000). Indeed, the 1866 treaties were "instruments of liberation, proclaiming that all slaves residing with Indian nations were to be considered full citizens of the nations." *Id.* Rule 19 cannot operate to preclude claims demanding the "fair and lawful administration" of a nondiscriminatory Judgment Fund distribution plan, *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1502 (9th Cir. 1991) (O'Scannlain, J., dissenting), because no lawful interest of the Tribe can be prejudiced by such demands.

The court of appeals rejected Petitioners' race discrimination showing and the district court's findings on this matter because it believed that any consideration of the issue would impermissibly commingle the jurisdictional

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[2] The Creek, Cherokee, Chickasaw, Choctaw, and Seminole Nations all have members of African descent; thus the issue in this case -- federal compliance with the Seminole Treaty of 1866 – has significant ramifications for African American Indians across this country.

[3] "Treaties were enacted abolishing slavery among the Indians because Indians were not considered U.S. citizens by virtue of the Fourteenth Amendment. *See Elk v. Wilkins*, 112 U.S. 94 (1884) (holding Indian born within United States, who voluntarily separates himself from tribe and resides with white citizens, is not citizen within meaning of Fourteenth Amendment)." Saito, 45 Vill. L. Rev. at 1170 n.198.

inquiry with adjudication on the merits. *See Davis II*, 343 F.3d at 1291. However, an analysis of jurisdictional facts is always necessary before a court can determine that a party has the sort of immunity which may shield it from suit. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 n.16, 122 (1968). Moreover, depending on the facts of the individual case, such jurisdictional factfinding may be fairly extensive. For example, in *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996), the court looked to the jurisdictional facts in "assess[ing] whether the nonparty Tribes have a legally protected interest in" the funds at issue in the litigation. The court analyzed the facts asserted in affidavits submitted by the party moving for Rule 19 dismissal and determined that the funds potentially available to the absent tribes would be so negligibly beneficial that the tribes had no legally protected interest in the funds' distribution. *Id.* Clearly, that court made substantial factual determinations in reaching its conclusion that the absent tribes lacked a legally cognizable interest. Similarly, in *Shenandoah v. United States Dept. of the Interior*, 159 F.3d 708, 714-15 (2d Cir. 1998), the court held that a determination as to the legitimacy of the tribal leader was necessary to determine the jurisdictional question of whether the tribe was "absent." In sum, not only is analysis of the merits permitted under Rule 19, it is necessary.

In addition, courts have recognized a "public rights" exception to the Rule 19 analysis where the litigation "transcend[s] the private interests of the litigants and seek[s] to vindicate a public right." *American Greyhound Racing v. Hull*, 305 F.3d 1015, 1026 (9th Cir. 2002) (quoting *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1995)); *see Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1500

(D.C. Cir. 1995); *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940) (proceeding vindicates public rights where its purpose is "to give effect to the declared public policy" embodied in the NLRA). Like the Civil War Amendments, the 1866 Treaty, which this litigation seeks to enforce, embodies a desire to vindicate the "larger public interest"[4] of putting an end to the racial discrimination that had torn the nation asunder.

B. The Strong Federal Policy Outlawing Race Discrimination Outweighs the Public Policy Favoring Tribal Sovereign Immunity

The lower courts' decision ultimately rested on what they termed a "strong policy . . . favoring dismissal when a court cannot join a tribe because of sovereign immunity." *Davis II*, 343 F.3d at 1293 (quoting *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999) ("*Davis I*")). The court noted that:

> Although we are sensitive to the problem of dismissing an action where there is no alternative forum, we think the result is less troublesome in this case than in some others. . . . This is not a case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.

Davis II, 343 F.3d at 1293.[5] The court's formulation of

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[4] *Kescoli*, 101 F.3d at 1311.

[5] While some court of appeals panels have held that tribal sovereign immunity effectively trumps the ordinary Rule 19 analysis in the same manner, *see, e.g.*, *Keweenah Bay Indian Community v. Michigan*, 11 F.3d

society's public policy choice ignores two critical facts: the federal government has a fiduciary obligation to individual tribe members; and both governments – the Seminole Tribe and the federal government – are bound by the 1866 Treaty to accord "all the rights of native citizens" to the Black Seminoles.

In this regard, the lower court's ruling conflicts with the decision in *Seminole Nation v. Norton*, 223 F. Supp. 2d 122 (D.D.C. 2002). There, the district court was asked to determine whether amendments to the Seminole Constitution that would have expelled the Black Seminoles from the Tribe could properly be rejected by the BIA. The court held that, despite the obviously discriminatory nature of the amendment, it

> must nevertheless attempt to resolve this dispute without sacrificing the Nation's right to retain its integrity and its right to self-determination. But it was [the Tribe], not the [federal government], who sought to adopt amendments to its constitution that would disenfranchise the Freedmen from participation in the political operations of the Nation, in total disregard of the rights afforded to those members by the Treaty of 1866 and the Nation's Constitution.

Id. at 138. The instant case is similar: the Tribe deliberately,

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1341 (6th Cir. 1993); *Pembina Treaty Comm. v. Lujan*, 980 F.2d 543 (8th Cir. 1992); *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986), other panels have held otherwise. *See, e.g.*, *American Greyhound Racing*, 305 F.3d at 1025 ("some courts have held that sovereign immunity forecloses in favor of tribes the entire balancing process under Rule 19(b), but [the Ninth Circuit] continue[s] to follow the four-factor process even with immune tribes.").

and with the complicity of the BIA, excluded the Black ("Estelusti") Seminoles from the programs established with Judgment Fund monies. *See Davis v. United States*, 199 F. Supp. 2d 1164, 1176 (D. Okla. 1999) ("The record demonstrates [that]... [t]he Estelusti Seminoles are effectively prohibited from participating in Judgment Fund Programs because of the Eligibility Requirement" that they produce proof of descent from a member of the 1823 Seminole Nation). Such efforts and outcomes are incompatible with the 1866 Treaty. As discussed above, the 1866 treaties with the various Native nations effectuated a broad and important federal policy of ensuring the emancipation of Black Indians by extending to them the protections that Congress would soon provide African Americans against discrimination by the states and private parties through the Thirteenth, Fourteenth, and Fifteenth Amendments. The Fifth Amendment already provided protection against such discrimination by the federal government.

Judicial vindication is especially important here because the racially discriminatory policies of the state of Oklahoma so profoundly influenced the political history of the Tribe. The 1907 Oklahoma constitution defined as "black" all persons with any degree of African ancestry, and mandated a segregated society, with public schools, hospitals, housing, cemeteries, and even pay-telephone booths formally separated between the races. The public policy by which the federal government "consciously opted to shield Indian tribes from suit," *Davis II*, 343 F.3d at 1293, should not shield from judicial review the consequences of this state discrimination on the political development of the tribal government over the years.

The decision below, if allowed to stand, would set in stone the Tribe's "total disregard" of the rights guaranteed to the Black Seminoles by the 1866 Treaty. The district court found in that its Rule 19 decision precluded *any* effective relief for the Black Seminoles. "Requiring plaintiffs to maneuver their claim through the Seminole Nation's legislative bodies would, in effect, be futile." 199 F. Supp. 2d at 1178. "The Court's disposition as to the Black Seminoles' Judgment Fund Award claim effectively terminates [their] opportunity to have their [claim] heard by an impartial adjudicative body . . .". *Id.* at 1180. Surely "equity and good conscience" does not command such a result. *See Shields v. Barrow*, 58 U.S. 130 (1855). Indeed, Rule 19 expressly counsels otherwise. *See, e.g., Collins v. General Motors Corp.*, 101 F.R.D. 1, 4 (W.D. Pa. 1982).

II. FEDERAL POLICIES GOVERNING THE FIDUCIARY OBLIGATIONS OF THE UNITED STATES TO NATIVE NATIONS AND THEIR MEMBERS REQUIRE THE COURT'S CONSIDERATION OF THIS CASE

The courts below neglected to consider the overriding federal policies commanding the Executive branch to honor the trust relationship between the government and Native nations and adhere to the treaties signed by them. This failure also mandates reversal of the decision below.

A. The BIA's Abrogation of the 1866 Treaty Constitutes a Serious Breach of the Government's Fiduciary Obligations and an Egregious Violation of Tribal Sovereignty

Although tribal sovereignty is not expressly mentioned in the Constitution, America's first nations were

given constitutional recognition in the Commerce Clause, which gives Congress the power to "regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, 8, cl. 3. From pre-colonial times to 1870, tribal sovereignty was expressly recognized in the numerous treaties executed by the British, the colonists, and later the United States, and the various Native nations with which each successive governing entity came in contact.

In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), a case concerning a dispute between the Cherokee Nation and the State of Georgia, Chief Justice John Marshall reviewed the historical and legal development of the federal-tribe relationship and found that Native nations had signed treaties and been treated as sovereigns by the European nations. That the United States had continued this relationship of alliances through treaties, he opined, "itself evidenced an acknowledgment of tribes' sovereign status." *Worcester*, 31 U.S. at 559-60. The *Worcester* decision, together with the decision in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), acknowledged the unique relationship between the United States and Native nations – one that is grounded in treaties, tribal sovereignty, and the Commerce Clause.[6]

The nature of the federal-tribal relationship has long been described in terms of the trust responsibility undertaken

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[6]To be sure, the federal government's recognition of Native nations as independent political entities that possess sovereign authority over their members and territories has always been circumscribed by the principle that these nations, in submitting to the power and protection of the government, necessarily gave up some attributes of their sovereignty. *See Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 209-211 (1978); *United States v. Kagama*, 118 U.S. 375, 379 (1886).

by the United States. *See, e.g.*, Northwest Ordinance of 1787, art. III, 1 Stat. at 52 (establishing a broad federal policy in regard to expansion and concomitantly acknowledging the government's duty to protect tribes); *Worcester*, 31 U.S. at 555 ("This relation was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."). Subsumed under this obligation are specific responsibilities, the fulfillment of which are judged by applicable standards of behavior. As the decisional authority makes clear, the most demanding duty is found when the federal government assumes a fiduciary relationship with a tribe. *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct. Cl. 1975). Fiduciaries are always held to exceedingly high levels of responsibility, and the courts have held that the federal government, once in that role, may not avoid its obligation. *Pyramid Lake Pauite Tribe v. Morton*, 354 F. Supp. 252, 256-57 (D.D.C. 1972).

Accordingly, Native nations have held the government to strict fiduciary standards in suits for breach of the federal trust responsibility with regard to specific tribal interests such as natural resource management or tribal investments. *See, e.g., Gila River Pima Maricopa Indian Community v. United States*, 9 Ct. Cl. 660, 677-78 (1986) (private trust law determines liability for breach of fair and honorable dealing with tribes in the presence of elaborate control of trust resources); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (government breached its fiduciary obligation to tribe by disbursing treaty annuity payments to tribal officials known for mismanagement); *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935) (upholding award of money damages for the taking of tribal

lands without just compensation as a result of a flawed federal survey); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919) (trust relationship requires the Secretary of Interior to dispose of lands held by tribe in a more exacting fashion than other public land acquisitions). Indeed, in *Seminole Nation*, this Court held that where a treaty required the United States to pay trust funds to tribal members, the federal government was to be judged "by the most exacting fiduciary standards" and should be held responsible for paying the monies to a tribal government that was well-known for misappropriating funds:

> The Seminole General Council, requesting the annuities originally intended for the benefit of the individual members of the tribe, stood in a fiduciary capacity to them. Consequently, the payments at the request of the Council did not discharge the treaty obligation if the Government, for this purpose the officials administering Indian affairs and disbursing Indian moneys, actually knew that the Council was defrauding the members of the Seminole Nation.
> * * *
>
> Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.

316 U.S. at 296-97.

The Court's decision in *Seminole Nation* provides the

roadmap for the proper determination of the issues presented in this case. Once again, the Department of the Interior (Bureau of Indian Affairs) here was charged by Congress with the responsibility of working with the Seminole Tribe to propose a plan for the use of the judgment funds to serve "common tribal needs." *Davis II*, 343 F.3d at 1287. Under these circumstances, the Executive's fiduciary obligation must be deemed to be of the highest order. *See United States v. Mitchell*, 463 U.S. 206, 225-26 (1983).

The plan developed by the Tribe's General Council provided that the Judgment Fund monies would be used for health, education, and social services programs, but did not delineate the parameters of any specific program. Instead, the plan provided that the General Council would develop programs which would be submitted to the BIA for approval. *Davis II*, 343 F.3d at 1287. The programs ultimately developed by the Seminole Judgment Fund Committee (a tribal body created by the General Council) – and approved by the BIA – were governed by tribal resolutions which contained eligibility requirements excluding the participation of the Black Seminoles. *Id.* at 1288. Further, the BIA's violation of its own CDIB card issuance policy – which should have permitted the Black Seminoles to participate in the Judgment Fund Programs – operated as well to bar their participation. *See Davis* at 199 F. Supp. 2d at 1178-80. The district court's jurisdictional findings that "the BIA intended to exclude the Black Seminoles from the benefits of the Judgment Fund Award," *id.* at 1169, and that it "assisted the Seminole Nation in formulating a plan that could prevent the Black Seminoles' participation in the Judgment Fund Award and still receive Congressional approval," *id.* at 1170, are binding on the court of appeals in its review of the district court's Rule 19 analysis. *See Montoya v. Chao*, 296 F.3d

952, 954-55 (10th Cir. 2002) ("We review a dismissal for lack of jurisdiction de novo, accepting the district court's findings of jurisdictional facts unless they are clearly erroneous."). Consequently, the court of appeals was compelled to accept the finding that the Executive participated in a deliberate plan to circumvent both the 1866 Treaty recognizing the Estelusti Seminoles' ancestral membership in the Tribe, and the Judgment Fund Distribution Act of 1990 requiring use of the funds to serve "common tribal needs." Indian Claims Distribution of Funds to Seminole Indians Act, 104 Stat. 143 (1990). The Court should not sanction the BIA's unlawful usurpation of Congressional authority here. *See Morton v. Ruiz*, 415 U.S. 199 (1974) (disallowing BIA's reinterpretation of Act intended to appropriate funds for programs for all Indians).

Given these facts – which the district court found when it necessarily resolved the jurisdictional factual disputes raised by the government's dispositive motions, *see Davis*, 199 F. Supp. 2d 1164 – the Executive's breach of its fiduciary obligation to members of the Seminole Tribe in this case is far more severe than that which this Court deemed unacceptable in *Seminole Nation*. However, neither the district court nor the court of appeals considered this breach when assessing whether the Seminole Tribe is a "necessary party" within the meaning of Rule 19(a). As the court of appeals acknowledges, the district court made no findings or conclusions whatsoever regarding this issue. *Davis I*, 192 F.3d at 959 n.6. The district court plainly erred when it failed to undertake any analysis of whether the Seminole Tribe is a necessary party and failed to assess whether the asserted interest was "legally protectable."

For its part, the court of appeals – without the benefit

of any district court findings on the issue of the Tribe's interest – unilaterally defined the interest as "an interest in determining eligibility requirements and adopting ordinances embodying those requirements," and concluded that such an interest is "neither fabricated nor frivolous." *Id.* at 959. In doing so, the court of appeals implicitly rejected the district court's express findings regarding the government's intent and role – and the Tribe's demonstrated interest – in barring the Black Seminoles from participating in the Judgment Fund Programs. The district court's findings make clear that the tribal resolutions at issue were intended to achieve this impermissible end. *See Davis*, 199 F. Supp. 2d at 1171-72. Because such an interest contravenes the federal policy recognizing the Estelusti people as part of the Seminole Tribe as well as the policy prohibiting race discrimination, *see* Point I, *supra*, it is an unconstitutional interest and cannot be asserted by the Nation as a "legally protected interest" within the meaning of Rule 19(a). Consequently, the Seminole Tribe is not a "necessary" party to this action.

B. The Lower Court's Affirmance of the Rule 19 Dismissal Contravenes This Court's Jurisprudence Governing the Abrogation of Treaty Rights

The government's formal recognition of the Black Seminoles as part of the Seminole Tribe – and their attendant right to seek enforcement of the federal policy promoting tribal self-determination – are guaranteed under the 1866 Treaty, and are therefore protected as the supreme law of the United States under the United States Constitution. *See Worcester*, 31 U.S. at 559-60 (applying the constitutional declaration to Indian treaties); *Bowen v. Doyle*, 880 F. Supp. 99, 136 (W.D.N.Y. 1995). The BIA's abrogation of the Treaty thus compels adjudication of the underlying

substantive issues in order to preserve tribal sovereignty.

The principle is long-standing that treaty rights and protections belong not only to Native nations as nations, but also to the individual members of those nations. *United States v. Winans*, 198 U.S. 371, 381 (1905); *United States v. Dion*, 476 U.S. 734, 738 n.4 (1986) (expressly noting that Indian treaty rights can be asserted by an individual member of the tribe). Further, the courts have specifically held that Native Americans have a right to share in tribal property by virtue of their membership in such tribes, *see, e.g., Halbert v. United States*, 283 U.S. 753, 762-63 (1931), and that this right is "legally enforceable." *See United States ex rel. Mosay v. Buffalo Brothers Management, Inc.*, 20 F.3d 739, 742 (7th Cir. 1994) (action brought by members of tribe to void gaming-related contracts). *Accord Menominee Tribe v. United States*, 391 U.S. 404 (1967) (holding that the federal termination legislation ending federal recognition of tribal entity did not extinguish tribal members' collective hunting and fishing rights as guaranteed in their treaties); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974) (same).

Indeed, the decisional authority is clear that individual nation members can challenge actions taken by the Department of the Interior that infringe upon the nation's right to self-governance. For example, in both *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983), and *Milam v. Department of the Interior*, 10 Indian L. Rep. 3013 (D. D.C. 1983), the courts questioned and modified Departmental actions that affected the identity of tribal representatives. *See also Morris v. Watt*, 640 F.2d 404 (D.C. Cir. 1981); *Coyote Valley Band of Pomo Indians v. United States*, 639 F.

Supp. 165 (E.D. Cal. 1986); *Logan v. Andrus*, 457 F. Supp. 1318 (N.D. Okla. 1978); *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

Petitioners in the case at bar seek relief similar to that awarded in *Winans* and *Halpern*. They are members of the Seminole Tribe who seek to vindicate the legal rights guaranteed to them by the United States in the 1866 Treaty. Petitioners seek to compel the BIA to recognize their membership in the Tribe as required by the Treaty and to enforce their attendant right to participate in the Judgment Fund Programs as required by the Distribution Act. The lower court's decision insulating the BIA's collaboration in the exclusion of the Black Seminoles from judicial scrutiny sanctions the BIA's unlawful abrogation of the 1866 Treaty.

Furthermore, Congress's approval of the Seminole Nation's general distribution plan here does not authorize the BIA's abrogation of the Treaty. In *United States v. Dion*, 476 U.S. 734, 739-40 (1986), the Court articulated the principles that Congress's intention to abrogate Indian treaty rights must be "clear and plain," and that "in the absence of explicit statement, the intention to abrogate or modify a treaty is not to be lightly imputed to Congress." Speaking to the issue of the standard for determining how such intent may be demonstrated, the Court noted that "[w]hat is essential is clear evidence that Congress actually *considered* the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* (emphasis added).

Under any interpretation of the facts presented here, there can be no doubt that the Congressional action undertaken here does not meet the test for abrogation of the

1866 Treaty. There is no dispute that neither the eligibility restrictions delineated in the tribal resolutions nor the BIA's CDIB card issuance policy was ever placed before Congress. *Davis*, 199 F. Supp. 2d at 1172-73. Congress simply was never notified that the legislation it was reviewing affected tribal treaty rights. *See Dion*, 476 U.S. at 739. And certainly nothing in the legislation passed by Congress authorizing the Seminole Tribe's general distribution plan demonstrates Congressional intent to abrogate those rights. *Id.* at 740.

Dion's requirement of "clear and reliable" evidence of Congressional intent to abrogate treaty rights provides a judicial check on legislation or Executive action that may go too far in taking away sovereign rights. Here, the BIA's actions are tantamount to an unauthorized revision of the Executive's recognition decision embodied in the 1866 Treaty. Were this Court to decline to review the lower court's decision here, the Department's action would be unreviewable, contrary to the presumption in favor of judicial review of agency action. *See, e.g., Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). As the Tenth Circuit held in *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1499 (10th Cir. 1997), when tribal sovereignty issues such as federal recognition are involved, the presumption in favor of judicial review trumps the shield of tribal sovereign immunity. The Tenth Circuit opined that no deference would be owed to a BIA recognition decision if the agency "acted contrary to federal law, namely Article 15 of the Treaty of 1866 with the Cherokee Nation," 117 F.3d at 1499, and thus held that the court "must itself decide whether the Delawares constitute a sovereign tribe." *Id.*

Conclusion

Tribal sovereignty is rooted not only in the history of this country, but in the Constitution and the numerous treaties it executed with tribes over the life of this nation. If history teaches us anything, it is that the only federal policy which can be justified, the only policy which is consistent with the historic treaty obligations of the United States, and the only policy which Native peoples will support, is a policy which respects and enforces treaties and requires that all Native Americans be treated fairly. *Amicus curiae* respectfully submit that the Court should grant the petition to vindicate the important federal policies at stake in this matter and to rectify the grievous injustice done to the Black Seminoles.

Respectfully submitted,

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